Supreme Court, U.S

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No.

In the Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS INC.,
PETITIONERS

v.

JERALDINE SCOFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when a verdict has been tainted by a jury's passion or prejudice, due process requires a trial court to grant a new trial instead of remittitur.

2. Whether, and in what circumstances, a trial court violates due process when it awards a substantial amount in compensatory damages but nevertheless proceeds to award punitive damages in an amount exceeding the one-to-one ratio indicated in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471 (2008).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Wyeth LLC is wholly owned by Pfizer Inc.; petitioner Wyeth Pharmaceuticals Inc. is wholly owned by Wyeth LLC. Pfizer has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Jeraldine Scofield; Wendell Forrester, special administrator for the estate of Pamela Forrester; and Jeffrey Ouellette and Richard Rowatt, special administrators for the estate of Arlene Rowatt.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

Wyeth LLC and Wyeth Pharmaceuticals Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Nevada Supreme Court (App., *infra*, 1a-44a) is reported at 244 P.3d 765. The trial court's orders granting remittitur (App., *infra*, 45a-52a) and denying petitioners' motion for a new trial (App., *infra*, 53a-64a) are unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on November 24, 2010. On February 15, 2011, Justice Kennedy extended the time within which to file a pe-

tition for a writ of certiorari to and including March 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This case involves claims by three plaintiffs who alleged that they had developed breast cancer as a result of taking medicines manufactured by petitioners and prescribed to them by their doctors. Although petitioners' labeling, which had been approved by the Food and Drug Administration (FDA), warned about the risk of breast cancer from the use of those medicines, plaintiffs claimed that those warnings were inadequate. The trial was bifurcated, with any consideration or assessment of punitive damages confined to the second phase. Incited by plaintiffs' improper and inflammatory closing argument in the first phase, however, the jury returned an award totaling $134.6 million. It quickly became clear that the jury had disregarded the trial court's instructions and that its award contained a sizable (and impermissible) punitive component. Although the trial court attempted to cure the defect in the proceedings by reinstructing the jury and ordering it to redeliberate, the jury ultimately returned an award of compensatory and punitive damages totaling almost exactly the same amount, $134.1 million—then the largest tort award in Nevada history.

As the lower courts recognized, the only explanation for this otherwise inexplicable verdict was that the jury

acted with passion and prejudice. Notwithstanding the very real possibility that the jury's passion and prejudice tainted its determination of liability, as well as its award of damages, the trial court attempted to save the verdict by remitting the award to a total of $22.8 million in compensatory damages and $35 million in punitive damages.

In the decision under review, the Nevada Supreme Court held, first, that, although the verdict had been tainted by the jury's passion and prejudice, the remittitur had cured the resulting error, and second, that, although the award of punitive damages was considerably larger than the already substantial award of compensatory damages, the award was not constitutionally excessive. App., *infra*, 1a-44a. The Nevada Supreme Court's decision was seriously flawed in each respect, and it warrants this Court's review.

1. Petitioners manufacture prescription medicines colloquially known as "hormone therapy," which have been approved for use for many decades to combat the symptoms of menopause and to prevent osteoporosis. For much of that time, there has been extensive scientific investigation and debate as to whether there is a link between hormone therapy and breast cancer. Pet. Nev. S. Ct. Br. 7-10, 50.

To this day, the FDA continues to approve petitioners' medicines as safe and effective. When the FDA approved one of those medicines in 1994, it paid particular attention to recent studies concerning the risk of breast cancer. In the "Warnings" section of the labeling, petitioners warned about seven risks, starting with "breast cancer." Petitioners explained that "[s]ome studies have reported a moderately increased risk of breast cancer (relative risk of 1.3 to 2.0) in those women on [hormone] therapy taking higher doses, or in those taking lower doses for prolonged periods of time." After requiring

certain revisions, the FDA approved the labeling, including the warning about the risk of breast cancer. Pet. Nev. S. Ct. Br. 7-10, 50.

In 2002, a study by the Women's Health Initiative (WHI), conducted under the auspices of the National Institutes of Health, reported that women who used hormone therapy were relatively more likely to develop breast cancer than women in the control group, although the absolute rate remained low (and the relative rate was in fact lower than indicated in the previously approved labeling). In consultation with the FDA, petitioners immediately revised the breast cancer warning on their labeling and notified doctors of the results of the WHI study. App., *infra*, 10a-11a; Pet. Nev. S. Ct. Br. 5-6, 10, 48-55.

2. In the wake of the WHI study, more than 10,000 women who had used hormone therapy and developed breast cancer filed suit against petitioners and other pharmaceutical companies, contending, *inter alia*, that the companies had failed to provide adequate warnings of the risk of breast cancer.

This case involves lawsuits filed in Nevada state court by three of those women.[1] In those lawsuits, plaintiffs alleged that, notwithstanding the accuracy of petitioners' warning about breast cancer in light of the state of scientific knowledge at the time, petitioners should have conducted additional testing earlier—and, if they had done so, the warnings would have been more definitive at the time plaintiffs began using hormone therapy. Plaintiffs sought punitive damages based on the allegation that pe-

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[1] After the trial in this case, two of the three plaintiffs died of unrelated causes. The administrators of their estates were substituted as parties on appeal and are named as respondents in this Court.

titioners had acted with malice or committed fraud in inadequately warning of the risk of breast cancer and marketing their hormone-therapy medicines. App., *infra*, 3a-5a.

The trial court consolidated plaintiffs' lawsuits for trial. Because plaintiffs sought punitive damages, Nevada state law required bifurcation of the trial, with any consideration or assessment of punitive damages confined to the second phase. See Nev. Rev. Stat. § 42.005. In the first phase, the jury was instructed to consider only whether petitioners were liable for plaintiffs' injuries; if so, how much plaintiffs should receive in compensatory damages; and whether petitioners had acted with malice or committed fraud. Only if the jury answered yes to the last question would the trial proceed to the second phase, in which the jury would be given the constitutionally required instructions concerning punitive damages and asked to determine how much (if anything) plaintiffs should receive in punitive damages. App., *infra*, 4a-5a; see *Philip Morris USA* v. *Williams*, 549 U.S. 346, 355, 357 (2007).

At trial in the first phase, plaintiffs' counsel made a series of improper arguments designed to inflame the jury and vilify petitioners. Over petitioners' objections, plaintiffs' counsel was allowed to argue: (1) that, based on the fallacy that correlation implies causation, petitioners had caused 100,000 other women to suffer breast cancer, enough to "fill the UNR and UNLV stadiums" (two Nevada college football stadiums whose pictures were then displayed to the jury); (2) that the jury should consider a poem plaintiffs' counsel recited about the Race for the Cure, describing "women of cancer" whose breasts were "cut off and thrown in the trash," whose skin "blistered hot from the radiation," and who had gone "bald" with "[n]o eyelashes, no eyebrows"; and (3)

that the jury should measure plaintiffs' pain and suffering for one year on the basis of the combined annual compensation paid to several of petitioners' executives who testified at trial. The trial judge not only overruled petitioners' objections to those statements, but refused to instruct the jury in the first phase that it could not base its determinations on a desire to punish petitioners for conduct that allegedly affected others. App., *infra*, 36a n.11; Pet. Nev. S. Ct. Br. 11, 12, 39-41.

At the conclusion of the first phase, the jury found petitioners liable and awarded plaintiffs a total of $134.6 million in damages. It quickly became clear that the jury's damages award in fact contained a sizable punitive component, in contravention of the court's instructions and the limits contained in the verdict form. Before the start of the second phase, the trial judge disclosed that the jurors had told the bailiff when they learned they were required to return to consider punitive damages: "We already did that. We already awarded damages to punish and make an example and so on and so forth." App., *infra*, 30a-32a, 41a-44a; Pet. Nev. S. Ct. Br. 13-14.

Petitioners moved for a mistrial, contending that the jury's premature determination of punishment—in violation of the trial court's instructions and in the absence of the constitutionally required instructions concerning punitive damages—constituted juror misconduct and tainted its verdict. Although the judge commented to counsel that "this verdict is not worth a nickel," he denied the motion and instead asked the jury whether it had previously "discuss[ed] and include[d] damages in its verdicts for the purpose of punishment or example." In response, the jury answered his question with a question of its own: "If we answer yes, can we consider punitive damages?" Given the jury's apparent determination to punish, petitioners renewed their motion for a mistrial,

which the judge again denied. Over petitioners' objection, the judge answered "yes" to the jury's question. Only then did the jury answer "yes" to the judge's original question, thereby acknowledging that it had already decided the issue of punishment. Pet. Nev. S. Ct. Br. 14.

The trial judge continued to refuse to grant a mistrial, instead instructing the jury to "deliberate again on the amount of compensatory damages without including any punitive [damages] in them." When the jury returned less than three hours later with an award of $35.1 million in compensatory damages, the judge permitted the trial to proceed to the second phase. In that phase, after less than two hours of deliberation, the jury awarded $99 million in punitive damages, for a total of $134.1 million in damages—effectively restoring the original award. Over petitioners' objections, the court entered judgment for plaintiffs in that amount. App., *infra*, 41a-44a; Pet. Nev. S. Ct. Br. 14-15.

Petitioners moved for a new trial or other relief. The trial court ultimately found that the "totality of the circumstances indicate that the amounts of the verdicts suggest they were the result of passion and prejudice." App., *infra*, 51a (internal quotation marks and citation omitted). Acknowledging the irregularities in the proceedings, the court conceded that "[i]t appears that the jury's feelings regarding punitive damages impacted its award of compensatory damages," which would be "flagrantly improper." *Id.* at 46a-47a (citation omitted). Further acknowledging the role that passion and prejudice had played in the substantial compensatory awards, the court noted that the jury had awarded compensatory damages that were 121, 132, and 751 times plaintiffs' actual damages, respectively. *Id.* at 47a. This despite the fact that, in the court's view, plaintiffs had offered "very limited evidence and argument in support of compensa-

tory damages"; had offered "no evidence" of future medical expenses; and "did not argue, or even suggest, an amount of general damages," which nevertheless constituted the "great bulk" of plaintiffs' compensatory damages. *Id.* at 46a-47a & n.2.

Notwithstanding those findings, the trial court denied petitioners' motion for a new trial and instead remitted the award to a total of $22.8 million in compensatory damages and $35 million in punitive damages. App., *infra*, at 47a-48a, 50a-51a.[2] Plaintiffs accepted the remittitur. *Id.* at 32a.

3. Petitioners appealed to the Nevada Supreme Court. As is relevant here, petitioners argued that, once the trial court determined that the verdict had been infected by the jury's passion and prejudice, remittitur was "patently inadequate," and the only proper remedy was a new trial. Pet. Nev. S. Ct. Br. 2-3; see *id.* at 5, 16-27. Petitioners also argued that, under the principles articulated in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and its progeny, the trial court violated due process when it awarded a substantial amount in compensatory damages but proceeded to award a considerably greater amount in punitive damages. Pet. Nev. S. Ct. Br. 55-58.

The Nevada Supreme Court affirmed. App., *infra*, 1a-44a. With regard to whether remittitur was an appropriate remedy, it agreed with the trial court that "the premature jury deliberations on punitive damages had

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[2] As remitted, the court awarded plaintiff Forrester a total of $21 million ($8 million in compensatory damages and $13 million in punitive damages); plaintiff Rowatt a total of $17.6 million ($7.6 million in compensatory damages and $10 million in punitive damages); and plaintiff Scofield a total of $19.3 million ($7.3 million in compensatory damages and $12 million in punitive damages).

significantly tainted the jury's verdict as being the result of passion and prejudice." *Id.* at 43a. The Nevada Supreme Court recognized that the passion and prejudice were "evident" both from the jury's initial award of $134.6 million in damages and from its almost identical subsequent award. *Ibid.* It further recognized that "the jury's improper deliberations may not have been salvaged" when the trial court reinstructed the jury and ordered it to redeliberate. *Ibid.* The Nevada Supreme Court nevertheless rejected petitioners' claim that they were entitled to a new trial, holding that "the verdicts were spared when the [trial] court granted the remittitur and reduced the awards." *Ibid.*

With regard to whether the punitive award was excessive, the Nevada Supreme Court concluded that, as remitted, the ratio between the punitive and compensatory awards was "well within the accepted ratios." App., *infra*, 40a.[3] The court did not specifically address petitioners' contention that, because the compensatory award was so substantial, the punitive award could not constitutionally exceed that amount. *Ibid.* The court then summarily considered the other *BMW* guideposts, determining that petitioners' conduct was reprehensible and that the award was not excessive when compared with the civil penalties authorized or imposed in similar cases. *Id.* at 40a-41a.

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[3] At points in its opinion, the Nevada Supreme Court appears to have been operating on the erroneous assumption that the trial court had awarded $57.8 million in punitive damages *alone*, rather than $57.8 million in compensatory and punitive damages combined. See App., *infra*, 32a, 40a.

REASONS FOR GRANTING THE PETITION

This case presents two issues of enormous importance to civil litigants. First, the Nevada Supreme Court held that remittitur—a mere reduction in a damages award—can purge the effect of a jury's passion or prejudice on a verdict. Second, it held that the remitted award of $35 million in punitive damages was not constitutionally excessive despite the substantial award of $22.8 million in compensatory damages.

As to the first issue, following an earlier decision of this Court, the overwhelming majority of federal courts of appeals and state courts of last resort to have considered the issue have held that only a new trial can cure a jury verdict that is the result of passion or prejudice. The Nevada Supreme Court's decision to permit remittitur, despite its recognition that passion and prejudice infected the verdict, cannot be reconciled with that body of authority.

As to the second issue, this Court indicated in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), that, when compensatory damages are "substantial," it may violate due process to award a greater amount in punitive damages. Since then, federal courts of appeals and state courts of last resort have differed over whether, and in what circumstances, such an award violates due process. This case presents a particularly suitable vehicle in which to address that frequently recurring issue, both because the compensatory damages here were substantial by any measure and because consideration of other guideposts confirms that the punitive damages were excessive. The Court should grant review to provide much-needed guidance on each issue and reverse the seriously flawed decision of the Nevada Supreme Court.

A. This Court Should Grant Review To Decide Whether The Only Appropriate Remedy For A Verdict Resulting From A Jury's Passion Or Prejudice Is A New Trial

1. The Federal Courts Of Appeals And State Courts Of Last Resort Are Divided On The Issue

a. Remittitur refers to the longstanding practice in federal and state courts whereby a court denies a defendant's motion for a new trial on the condition that a prevailing plaintiff accept a reduction in the damages awarded. When a court grants remittitur, "the plaintiff is given the option of either submitting to a new trial or accepting the amount of damages that the court considers justified." 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2815, at 160 (2d ed. 1995) (Wright & Miller).

This Court has long approved remittitur as a means of permitting courts to "overturn[] verdicts for excessiveness." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996). Remittitur is primarily used when a court concludes that "the jury's award is unreasonable on the facts"; in granting remittitur, a court effectively "substitute[s] [its] judgment for that of the jury." *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir.) (emphasis omitted), cert. denied, 528 U.S. 931 (1999).

b. This case presents the issue whether, as a matter of due process, remittitur is appropriate not only where the damages awarded are excessive, but where the verdict is tainted by a jury's passion or prejudice. This Court addressed the permissibility of remittitur in such circumstances, albeit without extended discussion, in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Moquin*, 283 U.S. 520 (1931). There, the Court granted certiorari to review a decision of the Minnesota

Supreme Court that had upheld a remittitur despite determining that the verdict in question was "excessive because of passion and prejudice." *Id.* at 521 (internal quotation marks omitted). This Court reversed. As a preliminary matter, the Court found it unnecessary to review the record below, relying on the Minnesota Supreme Court's determination that the verdict had been tainted by passion and prejudice. *Ibid.* Turning to "the action [that determination] requires," this Court held that "no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Ibid.* A reduction of damages through remittitur is an inappropriate remedy in such circumstances, the Court explained, because the "extent of the wrong inflicted" cannot be rectified by "calculation" that is "little better than speculation." *Id.* at 521-522.

Since *Moquin*, the federal courts of appeals have almost universally concluded that, while "mere excessiveness in the amount of an award may be cured by a remittitur, * * * excessiveness which results from jury passion and prejudice may not be so cured" and "a new trial is required." *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 504 U.S. 910 (1992); see *De Leon Lopez* v. *Corporacion Insular de Seguros*, 931 F.2d 116, 125 (1st Cir. 1991); *Earl* v. *Bouchard Transp. Co.*, 917 F.2d 1320, 1327 (2d Cir. 1990); *Dunn* v. *HOVIC*, 1 F.3d 1371, 1383 (3d Cir.) (en banc), cert. denied, 504 U.S. 910 (1993); *Arnold* v. *Eastern Air Lines, Inc.*, 681 F.2d 186, 206 (4th Cir. 1982), cert. denied, 460 U.S. 1102 (1983); *Consolidated Cos.* v. *Lexington Ins. Co.*, 616 F.3d 422, 435 (5th Cir. 2010); *Dresser Industries, Inc.* v. *Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992); *Dossett* v. *First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005); *Watec Co.* v. *Liu*, 403 F.3d 645, 655 (9th Cir. 2005); *Frederick* v. *Kirby Tankships, Inc.*, 205 F.3d 1277, 1284 (11th

Cir.), cert. denied, 531 U.S. 813 (2000); *McCown* v. *Boone*, 154 F.2d 19, 20 (D.C. Cir. 1946).

Numerous state courts of last resort, often relying on *Moquin*, have likewise concluded that remittitur is not an appropriate remedy when a verdict is the product of passion or prejudice. See *Hash* v. *Hogan*, 453 P.2d 468, 473 & n.15 (Alaska 1969); *Sabella* v. *Southern Pac. Co.*, 449 P.2d 750, 752 n.2 (Cal.), cert. denied, 395 U.S. 960 (1969); *Higgs* v. *District Court*, 713 P.2d 840, 861 (Colo. 1985); *Quick* v. *Crane*, 727 P.2d 1187, 1198 (Idaho 1986); *Ross* v. *Duluth, Missabe & Iron Range Ry. Co.*, 290 N.W. 566, 570 (Minn. 1940); *Stokes* v. *Wabash Ry. Co.*, 197 S.W.2d 304, 309 (Mo. 1946) (all citing *Moquin*); see also *Chilson* v. *Allstate Ins. Co.*, 979 A.2d 1078, 1085 (Del. 2009); *Jasper* v. *H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009); *Dixon* v. *Prothro*, 840 P.2d 491, 494 (Kan. 1992); *Nelson-Holst* v. *Iverson*, 479 N.W.2d 759, 762 (Neb. 1992); *Harris* v. *Mt. Sinai Med. Ctr.*, 876 N.E.2d 1201, 1208 (Ohio 2007).

By contrast, since *Moquin*, only a small minority of lower courts to have considered the issue have concluded that remittitur is an appropriate remedy when a verdict has been tainted by passion or prejudice. Among the federal courts of appeals, only the Sixth Circuit has taken that view, stating that remittitur is appropriate even when a verdict results from "passion, bias or prejudice." *Mid-Michigan Computer Systems, Inc.* v. *Marc Glassman, Inc.*, 416 F.3d 505, 509 (6th Cir. 2005) (internal quotation marks omitted); *Gregory* v. *Shelby County*, 220 F.3d 433, 443 (6th Cir. 2000). And some state courts of last resort, like the Nevada Supreme Court in the decision below, continue to permit remittitur even when a verdict is the product of passion or prejudice. See *Carr* v. *Nance*, No. 10-562, 2010 WL 5144789 (Ark. Dec. 16, 2010); *Pinecrest, LLC* v. *Harris ex rel. Estate of Callen-*

dar, 40 So. 3d 557, 560 (Miss. 2010); *Blessum* v. *Shelver*, 567 N.W.2d 844, 853 (N.D. 1997); *Bonn* v. *Pepin*, 11 A.3d 76, 78 (R.I. 2011). The lingering inconsistency in the approaches of federal courts of appeals and state courts of last resort on this frequently recurring issue warrants the Court's review.

2. *The Nevada Supreme Court's Decision To Allow Remittitur Is Erroneous*

The Nevada Supreme Court held that remittitur of the total damages award from $134.1 million to $57.8 million was an appropriate remedy, notwithstanding its determination that the jury's verdict resulted from passion and prejudice. See App., *infra*, 41a-44a. That holding is incorrect.

a. The majority rule that remittitur cannot cure a verdict that is infected by passion or prejudice is rooted in fundamental principles of due process. It is well established that, when a jury returns a verdict that is infected by passion or prejudice, due process mandates that the resulting verdict cannot be sustained. See, *e.g.*, *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (observing that "a jury award may not be upheld if it was the product of bias or passion"); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment) (stating that "[a] verdict returned by a biased or prejudiced jury no doubt violates due process"); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 475-476 (1993) (O'Connor, J., dissenting) (noting that "[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law" and "[i]f there is a fixture of due process, it is that a verdict based on such influences cannot stand").

When a jury returns a verdict that is infected by passion or prejudice, due process is not adequately served when a court orders remittitur instead of a new trial. That is because, when passion or prejudice taints the jury's deliberations, "it is virtually impossible to determine the degree to which those factors affected the jury generally," as opposed to particular aspects of the jury's decision. *Higgs*, 713 P.2d at 861. When a jury is simultaneously considering liability and damages, there is a very real risk that "prejudice may have infected the decision of the jury on liability, as well as on damages"—in which case remittitur would be an insufficient remedy. 11 Wright & Miller § 2815, at 165. As this Court noted in *Moquin*, "passion and prejudice * * * may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." 283 U.S. at 521; see *Dossett*, 399 F.3d at 947; *Dresser Industries*, 965 F.2d at 1448; *Stokes*, 197 S.W.2d at 309.

A case in which the verdict is tainted by a jury's passion or prejudice therefore materially differs from a case in which the damages awarded are excessive. In the latter instance, the court need only determine the amount that the jury could validly have awarded based on the evidence. See 11 Wright & Miller § 2815, at 167-168 (discussing remittitur standard). By contrast, when the verdict has been tainted by the jury's passion or prejudice, a court must put itself in the shoes of the jury and redo the *entire* verdict, by projecting what an untainted jury would have decided about both liability and damages. Just as bias on the part of the trial judge constitutes structural error requiring automatic reversal in criminal proceedings, see *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927), so too does passion or prejudice on the part of the jury deprive a defendant of its right to a fair trial and require more than remittitur in civil proceedings.

b. This case amply illustrates the difficulties with allowing remittitur in cases in which the verdict results from passion or prejudice. Both the trial court and the Nevada Supreme Court recognized that passion and prejudice had tainted the jury's verdict. See App., *infra*, 46a-47a, 51a (trial court); *id.* at 43a (Nevada Supreme Court). Yet the trial court seemingly assumed that the passion and prejudice had not tainted the jury's decision on *liability*. And as to the jury's damages award, the trial court simply reduced the compensatory and punitive awards to each plaintiff by roughly similar amounts, without any explanation for why the amounts it chose were appropriate. See, *e.g.*, *id.* at 47a-48a (reducing compensatory awards for past damages by $3 million per plaintiff); *id.* at 50a-51a & n.4 (reducing the punitive awards to plaintiffs Scofield and Rowatt by $21 million each, but reducing the punitive award to plaintiff Forrester by $22 million). The trial court therefore effectively replaced the jury's verdict with its own, based on "little better than speculation" about "the extent of the wrong" that the passion and prejudice inflicted on petitioners. *Moquin*, 283 U.S. at 521-522. The Court should grant review in this case to clarify that, as a matter of due process, remittitur is not appropriate in these circumstances.

3. The Issue Is An Important One That Warrants The Court's Review In This Case

There can be few questions as important to the integrity of the judicial system as the extent to which due process protects litigants from a jury's passion and prejudice. As discussed above, the question whether remittitur is an appropriate remedy when a verdict has been infected by passion or prejudice is a frequently recurring one, with lower courts reaching differing conclusions.

See pp. 11-14, *supra*. Virtually all of the federal courts of appeals, and many state courts of last resort, have now considered that issue, and there would therefore be little if any benefit to further percolation.

Furthermore, this case presents an excellent vehicle for consideration of the issue, because there is no doubt here that the jury's verdict was in fact infected by passion and prejudice. The trial court so found, and the Nevada Supreme Court agreed, stating unequivocally that the numerous improprieties below "tainted the jury's verdicts." App., *infra*, 43a (Nevada Supreme Court); see *id.* at 51a (trial court).

The lower courts' findings on passion and prejudice, moreover, were plainly correct. During the first phase of the trial, plaintiffs' counsel, over petitioners' objections, made repeated inflammatory statements to the jury. Most egregiously, plaintiffs contended that petitioners were responsible for enough cases of breast cancer to fill two football stadiums and urged the jury to consider a poem depicting cancer victims participating in the Race for the Cure. The trial judge not only overruled petitioners' objections to those statements, but refused to instruct the jury in the first phase that it could not base its determinations on a desire to punish petitioners for conduct that allegedly affected others. See pp. 5-6, *supra*.

The jury's subsequent conduct provided ample confirmation that its deliberations had been fatally tainted. The jury indisputably disregarded the trial court's instructions in the first phase and considered liability and punitive damages at the same time. It did so, moreover, without receiving the constitutionally required instructions on punitive damages—thus leaving the jury free (at the invitation of plaintiffs' counsel) impermissibly to award damages intended to punish not only petitioners'

conduct toward plaintiffs, but also petitioners' conduct toward non-parties. And when the trial judge asked the jury whether it had already decided punitive damages, the jury refused to answer until the judge provided assurances that it would still be able to impose punitive damages if it said yes. The jury proceeded to subtract a portion of the original verdict from its compensatory award, only to add it back in when it made its new punitive award.

The trial court's extraordinary series of errors in this case cannot be rectified through the simple expedient of a remittitur that reduced the damages to "only" $57.8 million. This case is an ideal vehicle for the Court to resolve the conflict among the lower courts and hold that, when a jury verdict is infected by passion or prejudice, a new trial is the only appropriate remedy.

B. This Court Should Grant Review To Decide Whether The Remitted Punitive Damages Are Constitutionally Excessive

1. The Federal Courts Of Appeals And State Courts Of Last Resort Are Divided On The Circumstances Under Which A Punitive Award May Exceed A Substantial Compensatory Award

Even if the remittitur in this case otherwise satisfied the requirements of due process, the Court's review would nevertheless be warranted because this case presents an important and independent issue concerning the constitutionality of an award of punitive damages that exceeds an already substantial award of compensatory damages.

a. In a series of pathmarking decisions starting with *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), this Court has recognized that due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at

416. The Court has instructed lower courts to consider three guideposts in assessing the validity of a punitive award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

b. Since the Court's decision in *BMW*, lower courts have struggled with the application of these guideposts. Perhaps the greatest disarray concerns the "disparity" guidepost, which requires a court to consider the ratio of punitive damages to "the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580. This Court has "decline[d]" more generally to "impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm*, 538 U.S. at 425. At the same time, however, the Court has specifically stated that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Ibid.*; see *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 501, 514 (2008) (characterizing foregoing principle as a "due process standard[] that every award must pass" and a "constitutional upper limit").

In the absence of more definitive guidance from this Court, lower courts have taken divergent approaches as to what constitutes a "substantial" award of compensatory damages and whether the "lesser ratio" of 1:1 is a true constitutional limit or merely a guideline. The Sixth Circuit, for example, has deemed "substantial" a series of compensatory awards ranging from $400,000 to $6 million. See *Morgan* v. *New York Life Ins. Co.*, 559 F.3d 425, 442 (2009); *Bach* v. *First Union Nat'l Bank*, 486

F.3d 150, 155-156 (2007); *Pollard* v. *E.I. DuPont de Nemours, Inc.*, 412 F.3d 657, 668 (2005). In each of those cases, moreover, the Sixth Circuit required a ratio of punitive or compensatory damages of or approximating 1:1. See *Morgan*, 559 F.3d at 443 (vacating and remanding for punitive damages "not to exceed the amount of compensatory damages"); *Bach*, 486 F.3d at 155-156 (concluding that "a ratio of 1:1 or something near to it is an appropriate result"); *Pollard*, 412 F.3d at 668 (noting that "[t]he total compensatory damages of $2.2 million is close to a 1-to-1 ratio").

Similarly, the Eighth Circuit has deemed compensatory awards ranging from $600,000 to over $4 million to be "substantial," and, on that basis, imposed a ratio of or approximating 1:1. See *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 876 (2008) (affirming punitive damages of $1.15 million where compensatory damages were $1.1 million); *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (2005) (holding that, "given the $4,025,000 compensatory damages award in this case, * * * a ratio of approximately 1:1 would comport with the requirements of due process"); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (2004) (observing that $600,000 in compensatory damages is "a lot of money" and concluding that "due process requires that the punitive damages award * * * be remitted to $600,000").

Other courts of appeals and state courts of last resort have applied a similarly stringent approach. See, *e.g.*, *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 55 (1st Cir. 2009) (noting that a $35,000 compensatory award was "substantial" and concluding that "this fact supports the one-to-one ratio between the compensatory damages * * * and a $35,000 punitive damages award"); *Jurinko* v. *Medical Protective Co.*, 305 Fed. Appx. 13, 30 (3d Cir. 2008) (reducing the punitive award

to "reflect a 1:1 ratio" in light of a compensatory award of $1.7 million); *Roby* v. *McKesson Corp.*, 219 P.3d 749, 769-770 (Cal. 2009) (applying the "federal constitutional limit" of *State Farm* to a compensatory award of $1.9 million).

By contrast, other courts have held that, even though an award of compensatory damages was concededly "substantial," a 1:1 ratio was not required. See, *e.g.*, *Planned Parenthood of Columbia/Willamette Inc.* v. *American Coal. of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (addressing compensatory damages ranging from $375 to $406,000 and holding that "[m]ost of the compensatory awards are substantial," but remitting punitive awards at 9:1 ratio), cert. denied, 547 U.S. 1111 (2006); *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (holding that a $50,000 compensatory award was substantial, but remanding for punitive award at ratio between 6:1 and 9:1); *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (holding that a $500,000 compensatory award was substantial, but affirming punitive award at 4:1 ratio), cert. dismissed, 540 U.S. 1158 (2004); *Goddard* v. *Farmers Ins. Co.*, 179 P.3d 645, 667-668 (Or. 2008) (holding that a $691,000 compensatory award was substantial, but applying 4:1 ratio to punitive award); *Seltzer* v. *Morton*, 154 P.3d 561, 613 (Mont. 2007) (holding that a $1.1 million compensatory award was substantial, but affirming punitive award at 9:1 ratio). Perhaps most remarkably, on remand from this Court in *State Farm* itself, the Utah Supreme Court applied a 9:1 ratio to the punitive award where the compensatory award was $1 million—the very same award that this Court had described as "substantial." See *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 417 (Utah), cert. denied, 543 U.S. 874 (2004).

Further complicating the issue, some courts have seemingly recognized that a 1:1 ratio is required where an award of compensatory damages is "substantial," but have either explicitly or implicitly held that sizable compensatory awards were not sufficiently substantial to trigger that requirement. See, *e.g.*, *Action Marine, Inc.* v. *Continental Carbon Inc.*, 481 F.3d 1302, 1321-1322 & n.24 (11th Cir. 2007) (recognizing that the 1:1 ratio is "the general rule when substantial compensatory damages have been awarded," but affirming punitive award at 5:1 ratio based on compensatory damages of $3.2 million), cert. denied, 554 U.S. 932 (2008); *Flax* v. *Daimler-Chrysler Corp.*, 272 S.W.3d 521, 539 (Tenn. 2008) (holding that a compensatory award of $2.5 million was not "so large as to require a ratio of 1 to 1"), cert. denied, 129 S. Ct. 2433 (2009); see also *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-1372 (Fed. Cir. 2003) (affirming punitive award at nearly 3:1 ratio based on compensatory damages of $15 million), cert. denied, 540 U.S. 1183 (2004).

Clearly, then, there is considerable confusion among the lower courts concerning what constitutes a "substantial" award of compensatory damages and to what extent the 1:1 ratio cited in *State Farm* and *Exxon Shipping* limits punitive damages in the face of such an award. That confusion has not gone unnoticed by commentators, who have pointed out that, while some lower courts "have heeded *State Farm*'s admonition that a lower ratio is appropriate where the amount of compensatory damages is substantial," others have "all but ignored" the Court's "recommendation of a 1:1 ratio in these cases." Lauren R. Goldman & Nickolai G. Levin, *'State Farm' at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J.L. & Bus. 509, 546 (2006). The Court's review is desperately needed to provide guidance to the

lower courts on this vitally important and frequently recurring issue.

2. *The Nevada Supreme Court's Decision To Uphold The Punitive Award Is Erroneous*

The Nevada Supreme Court affirmed the remitted punitive award of $35 million, notwithstanding the fact that it considerably exceeded the already substantial award of $22.8 million in compensatory damages. See App., *infra*, 39a-41a. In upholding the punitive award, the Nevada Supreme Court erred.

a. As this Court indicated in *State Farm* and *Exxon Shipping*, when a court awards a substantial amount in compensatory damages, it would violate due process to award an even greater amount in punitive damages. As the Court has explained, punitive damages are designed to deter and to punish. See *State Farm*, 538 U.S. at 416. Where compensatory damages are small, higher ratios of punitive to compensatory damages are constitutionally permissible, because plaintiffs would otherwise have little incentive to bring suit and juries would have limited opportunities to exact retribution. See *ibid.*; *BMW*, 517 U.S. at 582. When compensatory damages are substantial, however, the need for deterrence and retribution is accordingly lower, for the compensatory award itself serves deterrent and retributive purposes. A "substantial" compensatory award "takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit." *Exxon Shipping*, 554 U.S. at 515 n.28. And because "there is no clear line of demarcation between punishment and compensation" in cases involving claims for damages such as pain and suffering, a substantial compensatory award that significantly exceeds the plaintiff's actual damages will often reflect the jury's desire not just to make the

plaintiff whole but to punish the defendant. Restatement (Second) of Torts § 908 cmt. c (1979); see *State Farm*, 538 U.S. at 426.

b. This is the paradigmatic case in which the compensatory award itself serves deterrent and retributive purposes, such that a punitive award that is over $12 million larger than the compensatory award is inappropriate.

As an initial matter, the compensatory damages here were indisputably "substantial," whether taken together ($22.8 million) or separately ($8 million, $7.6 million, and $7.3 million, respectively). The $22.8 million awarded in total to plaintiffs is far higher than amounts other courts have deemed substantial, see pp. 19-21, *supra*, and indeed is 22.8 times larger than the compensatory damages that this Court deemed "substantial" in *State Farm*, see 538 U.S. at 426.[4]

In this case, it is particularly clear that those substantial compensatory damages serve to deter and punish, as well as to compensate. As the trial court itself recognized, the "great bulk" of the compensatory damages "were for pain, suffering and emotional distress." App., *infra*, 46a. The only evidence of actual damages presented by plaintiffs was their medical bills, which totaled only $130,000. See *id.* at 46a & n.1. Because the compensatory award (even as remitted) was *175 times* that amount, the punitive award in this case "likely

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[4] Notably, the Court has stated that, for purposes of triggering the 1:1 ratio, "individual awards are not the touchstone" in cases in which multiple plaintiffs are involved. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 515 n.28 (2008). Even if the compensatory award were broken down into the individual awards to each plaintiff, however, those awards comfortably exceed the awards deemed "substantial" by other courts and by this Court in *State Farm*.

* * * duplicated" substantial aspects of the compensatory award, *State Farm*, 538 U.S. at 426.[5] And given the jury's fixation on punishment when it determined compensatory damages in this case, the duplication between the compensatory and punitive awards here was not simply "likely," but nearly certain.

In the particular context of mass tort litigation such as pharmaceutical litigation, moreover, there is far less need for punitive damages in order to achieve the goals of deterrence and punishment. In cases in which there may be thousands of plaintiffs seeking damages in individual lawsuits, the combined cost of compensatory awards alone can run into the billions of dollars. As Judge Friendly observed even before the advent of multidistrict litigation, a "manufacturer distributing a drug to many thousands of users under government regulation scarcely requires th[e] additional measure [of punitive damages] for manifesting social disapproval and assuring deterrence," for "[c]riminal penalties and heavy compensatory damages" are ordinarily sufficient to satisfy those objectives. *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 840-841 (2d Cir. 1967); see Restatement (Second) of Torts § 908 cmt. e. In sum, the circumstances here are precisely those in which a punitive award that is larger than the already substantial compensatory award surpasses the "outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

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[5] Even when considered individually, the smallest of the remitted awards in this case is nearly twice as large as the next largest award in any of the other 14 trials to date in the hormone therapy litigation.

c. This case is a particularly suitable candidate in which to apply the 1:1 ratio because the other *BMW* guideposts weigh against a sizable punitive award.

i. As to reprehensibility, undisputed evidence established that petitioners provided explicit, detailed warnings regarding breast cancer to doctors and patients throughout the period in question, and those warnings, as plaintiffs' regulatory expert acknowledged, accurately reflected then-existing science. See Pet. Nev. S. Ct. Br. 50. The warnings, moreover, candidly disclosed the limits of the existing scientific knowledge, noting that some studies showed a small increased risk of breast cancer while others showed no risk at all. See *id.* at 7-8, 51. In addition, petitioners' position reflected the majority view in the ongoing medical and scientific debate: of the hundreds of articles in the medical literature about hormone therapy and breast cancer, plaintiffs could cite only three claiming that hormone therapy "causes" breast cancer. See *id.* at 51-52. In the presence of such a genuine dispute in the medical and scientific community, a defendant's conduct cannot be said to be reprehensible, and punitive damages are unwarranted. See, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006); *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), cert. denied, 516 U.S. 1045 (1996).[6]

In addition, undisputed evidence established that petitioners complied with all relevant FDA requirements for warning about the risk of breast cancer and kept the FDA informed of the available scientific data regarding the risk. See Pet. Nev. S. Ct. Br. 8-9, 51, 57. The FDA

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[6] In addition, petitioners actively supported further research concerning the possible association between hormone therapy and breast cancer. See Pet. Nev. S. Ct. Br. 50.

itself focused on the breast-cancer risk in approving one of petitioners' medicines in 1994 and reapproving it in 1995 and 1998. See *id.* at 8-10. Although that compliance does not affirmatively preempt plaintiffs' failure-to-warn claims, see *Wyeth* v. *Levine*, 129 S. Ct. 1187 (2009), it does constitute compelling evidence weighing against a determination of reprehensibility. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 626 F.2d 1031, 1035 (D.C. Cir. 1980); *Phillips* v. *Cricket Lighters*, 883 A.2d 439, 447 (Pa. 2005); *Alcorn* v. *Union Pac. R.R. Co.*, 50 S.W.3d 226, 249 (Mo. 2001).

In support of their argument that petitioners' conduct was reprehensible, plaintiffs relied almost entirely on evidence of conduct by petitioners that was unconnected either to the individual plaintiffs or to the State of Nevada. See, *e.g.*, App., *infra*, 10a (describing the alleged ghostwriting of journal articles that were not read by plaintiffs or their doctors); *id.* at 9a-10a (describing marketing practices that did not reach plaintiffs' doctors). As this Court has made clear, however, such evidence cannot play any role in the determination of punitive damages, because the Due Process Clause prohibits States from punishing a defendant "for injury that it inflicts upon * * * strangers to the litigation," *Philip Morris*, 549 U.S. at 353, or for conduct, lawful or unlawful, that was "committed outside of the State's jurisdiction," *State Farm*, 538 U.S. at 421.

Those points are especially salient here because plaintiffs Rowatt and Scofield began taking petitioners' medicines in Oregon and Washington, respectively, and lived in those States for all but a few months of their use of the medicines. See App., *infra*, 14a; Pet. Nev. S. Ct. Br. 6-7. The alleged failure to warn that was the basis of their claims therefore took place in Oregon and Washington. But under the laws of those States, punitive

damages would be unavailable. See Or. Rev. Stat. § 30.927; *Sofie* v. *Fibreboard Corp.*, 771 P.2d 711, 726 (Wash. 1989) (en banc). Affording those plaintiffs punitive damages under *Nevada* law, without discounting for the fact that most of the relevant conduct occurred outside Nevada, raises serious constitutional concerns. As this Court has noted, "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm*, 538 U.S. at 422. The practical effect of applying Nevada law to afford plaintiffs punitive damages is to "impose[] [Nevada's] own policy choice" on Oregon and Washington, in contravention of that basic constitutional principle. *BMW*, 517 U.S. at 571-572.

ii. As to comparable penalties, the Nevada Supreme Court merely pointed to "a recent comparable fine" for $600 million against "a company that promoted its drug for unapproved benefits." App., *infra*, 40a. As a preliminary matter, while the court noted the testimony of plaintiffs' regulatory expert concerning that fine, the expert never identified the target of the fine; the conduct that led to the fine; or any other information that would support using the fine as a comparator. The "comparable penalties" guidepost requires a court to consider the "penalties that could be imposed for *comparable misconduct*." *BMW*, 517 U.S. at 583 (emphasis added). But the record wholly lacked any details about the "misconduct" upon which the supposedly comparable penalty was based.

In addition, this Court has never approved the use of federal penalties—much less federal criminal fines of the type seemingly at issue here—when examining an award

of punitive damages under *state* law. See *State Farm*, 538 U.S. at 428 (noting that courts must consider "the seriousness with which a State views the wrongful action" and looking to "[t]he most relevant civil sanction under Utah state law"); *BMW*, 517 U.S. at 584 (reviewing penalties authorized by state legislatures). Just as the Court did not, in those decisions, invoke recent fines imposed by the federal government for deceptive behavior, nor should the Nevada Supreme Court have looked to a recent federal fine, rather than to the most relevant comparable penalty—Nevada's $5,000 penalty for engaging in deceptive trade practices. See Nev. Rev. Stat. § 598.0999(2).

Finally, a "recent" penalty does not provide a defendant with the fair notice required by the Constitution. The Due Process Clause "dictate[s] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574). That fundamental principle is violated if a court may, as a basis for affirming a punishment, invoke a penalty indisputably imposed *after* the conduct in question, as occurred here. Because petitioners had no fair notice that, many years later, the federal government would impose a $600 million fine on another company, they had no opportunity to conform their behavior accordingly.

By any standard, therefore, the punitive award in this case was grossly excessive and arbitrary. The Court should grant certiorari to clarify that the 1:1 ratio is applicable where, as here, compensatory damages are "substantial," and hold that the $35 million punitive award in this case violated due process.

3. The Conflict Among The Lower Courts Warrants The Court's Review In This Case

The question whether the 1:1 ratio is a strict limit in cases involving substantial compensatory damages or merely a guideline is an important and recurring one warranting the Court's review. As discussed above, the lower courts are plainly struggling with that question, reaching different results on materially identical facts. See pp. 19-22, *supra*. The resulting disuniformity has serious consequences for both plaintiffs and defendants, because the permissible size of punitive awards has come to depend on the particular jurisdiction in which the awards are imposed and reviewed. If, for example, this case had been tried in the Eastern District of Arkansas—where federal hormone-therapy cases have been consolidated by the Judicial Panel on Multidistrict Litigation—plaintiffs almost certainly would have been limited to $22.8 million in punitive damages, given the Eighth Circuit's fidelity to the 1:1 ratio. In essence, then, petitioners are paying over $12 million more simply because they faced suit in Nevada state court rather than Arkansas federal court. That "feature of happenstance," *Exxon Shipping*, 554 U.S. at 502, cannot be reconciled with this Court's commitment to ensuring that a defendant has "fair notice of the severity of the penalty" that may be imposed. *Philip Morris*, 549 U.S. at 352 (internal quotation marks and ellipsis omitted).

This case, moreover, is an ideal vehicle in which to address the question. By any measure, the $22.8 million in compensatory damages is "substantial"; therefore, the Court need not dwell upon whether that antecedent condition has been satisfied—a significant obstacle to review in many of the cases in which this Court has previously had the opportunity to consider the question. See, *e.g.*, *Fortis Ins. Co.* v. *Mitchell*, cert. denied, 130 S. Ct. 1896

(2010) (No. 09-854) ($150,000 in compensatory damages); *DaimlerChrysler Corp.* v. *Flax*, cert. denied, 129 S. Ct. 2433 (2009) (No. 08-1010) ($2.5 million); *Energen Resources Corp.* v. *Jolley*, cert. denied, 129 S. Ct. 1633 (2009) (No. 08-1001) ($1.9 million). Indeed, the compensatory damages here are higher than in any previous petition presenting the question to this Court except one—and in that case (which presented the question only indirectly), the petition was dismissed by agreement of the parties. See *NiSource Inc.* v. *Estate of Tawney*, cert. dismissed, 129 S. Ct. 1186 (2008) (No. 08-229). As noted above, moreover, the other *BMW* guideposts here weigh against, rather than in favor of, a sizable punitive award—making this case a particularly appropriate vehicle in which to hold that the 1:1 ratio is applicable. See pp. 26-29, *supra*.

Members of this Court have famously expressed divergent views as to the propriety of reviewing the excessiveness of punitive damages. The propriety of that review having been established, however, there can be no disagreement that lower courts need guidance as to the circumstances under which punitive damages are excessive—and, in particular, on the longstanding question of whether a court may award a greater amount in punitive damages when compensatory damages are already substantial. The Court's review is warranted to provide much-needed clarity on that question and to reverse the manifestly unjust outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

SUPREME COURT OF NEVADA

No. 51234

WYETH, A DELAWARE CORPORATION, AND ITS DIVISIONS AND SUBSIDIARIES; AND WYETH PHARMACEUTICALS, INC., A DELAWARE CORPORATION, AND ITS DIVISIONS AND SUBSIDIARIES, Appellants,

v.

ARLENE ROWATT; WENDELL FORRESTER, DULY APPOINTED SPECIAL ADMINISTRATOR FOR THE ESTATE OF PAMELA FORRESTER; AND JERALDINE SCOFIELD, Respondents.

November 24, 2010

Before the Court En Banc.[1]

CHERRY, Justice.

OPINION

This case arises from personal injury and strict products liability actions filed by respondents against

[1] The Honorable Kristina Pickering, Justice, voluntarily recused from participation in the decision of this matter.

appellants after respondents took appellants' drugs for years and were subsequently diagnosed with breast cancer. The matter was presented to a jury, with the assessment of damages being bifurcated, as respondents also sought punitive damages against appellants. A verdict was rendered in respondents' favor, awarding compensatory and punitive damages. On appellants' motion, the district court decreased the amount of damages but denied appellants' motion for a new trial and judgment as a matter of law.[2]

In this appeal, we are asked to decide three main issues. First, we must determine whether the district court erred in finding that Nevada law applied to the underlying action because respondents were diagnosed with cancer in Nevada. We agree with the district court's conclusion, and we adopt the "last event necessary" analysis to determine choice of law when an injury involves a slow-developing disease, such as cancer, and under that analysis the last event necessary for a claim against a tortfeasor is the place where the plaintiff becomes ill.

Second, we are asked to decide whether the district court abused its discretion when it gave a substantial-factor causation instruction, rather than a but-for causation instruction, and when it subsequently modified the instruction. We agree with appellants that the district court abused its discretion when it gave a

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[2] The district court certified the judgment as final under NRCP 54(b), as respondents' claims against appellants have been fully resolved and respondents have no claims pending against another party. Thus, the resolution of respondents' claims below removed them as parties from the underlying action. Additionally, other plaintiffs' claims remain pending against appellants. *See Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 797 P.2d 978 (1990).

substantial-factor causation instruction because each party argued its own theory of causation, mutually exclusive of the other, and respondents' injuries were purportedly only caused by one act. Nevertheless, the error was harmless, as appellants failed to demonstrate that their substantial rights were affected so that, but for the error, a different result may have been reached. The district court's modification of the instruction was not an abuse of discretion as it tailored the instruction to comply with existing scientific consensus, consistent with the evidence presented at trial.

Third, we address whether the compensatory and punitive damages awards are supported by substantial evidence and are excessive, even after the district court reduced the amount of the awards. Both awards are supported by substantial evidence. As to the compensatory damages, the awards do not shock our conscience and, thus, are not excessive. Regarding the punitive damages awards, the amounts awarded do not violate appellants' due process rights, as the awards are reasonable and proportionate to appellants' actions, or lack thereof. Finally, although the jury improperly and prematurely deliberated punitive damages, the error was cured by the jury's redeliberation and the district court's subsequent granting of the remittitur. Because we perceive no reversible errors in the issues raised on appeal, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL HISTORY

Respondents Arlene Rowatt, Pamela Forrester, and Jeraldine Scofield all took hormone replacement therapy drugs for a number of years and later developed breast

cancer.[3] The specific hormone replacement drugs prescribed to respondents were in one of two forms: two pills—one estrogen pill and one progestin pill, or a single pill that combined both hormones. Appellants Wyeth and Wyeth Pharmaceutical, Inc., manufactured and sold the estrogen pill known as Premarin, which was combined with a progestin pill manufactured by a different pharmaceutical company. Wyeth also manufactured the combination hormone pill known as Prempro.

Respondents Rowatt and Scofield were prescribed the two-pill hormone medication when they lived in other states. Rowatt was later prescribed Prempro. After moving to Nevada, and while still on the medication, both women were diagnosed with breast cancer. Respondent Forrester, a Nevada resident, was originally prescribed the two-pill regimen before switching to a Prempro prescription. Before being diagnosed with cancer, respondent Forrester switched to another manufacturer's estrogen-based hormone product.

In 2004, each woman filed a personal injury and strict products liability suit against Wyeth in the district court.[4] The three cases were subsequently consolidated and set for trial. Because respondents also alleged punitive damages claims against Wyeth, the trial was bifurcated into two phases. In the first phase, the jury was to determine whether Wyeth was liable for

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[3] Subsequent to the conclusion of the underlying trial, respondent Forrester passed away from causes unrelated to the injuries claimed in the district court action. Forrester is represented on appeal by her husband, Wendell Forrester, as the special administrator for her estate.

[4] Respondents Forrester and Scofield also filed claims against the progestin manufacturer. Those claims were resolved before trial.

respondents' injuries and the amount of any compensatory damages. The jury was also asked to consider whether Wyeth acted with malice or committed fraud, and if the jury made either finding, a second trial would be conducted to determine the amount of punitive damages, if any, to award respondents.

Respondents had three main theories of liability that they presented to the jury. First, they contended that Wyeth's failure to study the estrogen-progestin combination was a legal cause of their cancer because Wyeth had knowledge that hormone-receptive organs, such as breast tissue, responded to the introduction of additional hormones in the body, and Wyeth allegedly failed to reasonably test the estrogen-progestin combination based on that knowledge. Second, respondents argued that Wyeth failed to adequately warn them and their physicians about the breast cancer risk associated with the estrogen-progestin combination. Third, respondents alleged that Wyeth's drugs were unreasonably dangerous because they could cause breast cancer and respondents purportedly developed breast cancer as a result of taking the estrogen-progestin combination. Based on these same theories, respondents asserted that Wyeth acted with malice, so as to warrant the award of punitive damages.

At trial, respondents offered evidence of Wyeth's development of Premarin and Prempro and various independent studies of the drugs. The evidence was presented to the jury to establish that Wyeth's knowledge that there was a potential increased risk of breast cancer, combined with its failure to conduct its own studies to determine the precise risk, was a legal cause of respondents' cancers. We begin by examining

Premarin's and Prempro's history in conjunction with independent studies.

The development of hormone replacement therapy

In 1942, Wyeth introduced Premarin, an estrogen hormone used to treat menopausal symptoms. By the 1970s, the medical community had recognized a potential link between the use of estrogen and endometrial cancer. Wyeth's Premarin sales dropped. In 1976, Wyeth's internal documents show that its researchers knew that the presence of both estrogen and progestin in a tumor indicates that the tumor had responded to hormones. In the late 1970s, a published scientific article recommended adding progestin to an estrogen regimen to avoid the risk of developing endometrial cancer. Consequently, physicians began prescribing estrogen and progestin. Respondents' physicians prescribed them Wyeth's Premarin with another manufacturer's progestin.

In 1983, Wyeth sought approval from the FDA to study and market the combination of estrogen and progestin. The FDA allowed Wyeth to study the drugs' combination, but rejected its application to market the drugs together. The FDA specifically told Wyeth that a large, long-term study was first needed to evaluate the drug combination's safety. An internal Wyeth document shows, however, that the company viewed such studies as costly and lengthy, with unpredictable results. In 1988, Wyeth was approached for funding to conduct a study that consisted of reviewing data of women who had already been taking estrogen and progestin for a number of years. Wyeth declined to fund the study. In fact, Wyeth's documents showed that it had a company policy of not supporting breast cancer studies.

Starting in the late 1980s and early 1990s, independent studies were published that linked an increase in breast cancer risk to the estrogen-progestin hormone therapy regimen. For example, in 1989, a study was published in the New England Journal of Medicine that showed a 4.4 relative risk[5] of breast cancer in premenopausal women. The study characterized the risk as a "slightly increased risk of breast cancer" among women who took estrogen plus progestin for a long time. The 1989 study was followed by another study shortly thereafter confirming those results. In 1990, another independent study showed an increased risk of developing breast cancer when the hormone therapy regimen was estrogen plus progestin. Internal Wyeth documents show that it responded to studies suggesting a possible breast cancer risk by downplaying the risk through public relations campaigns and its sales representatives' interactions with physicians. Wyeth also created an internal task force to counteract such findings.

In 1992, the FDA's advisory committee noted that there was insufficient data to determine whether adding progestin to estrogen increased the breast cancer risk. Wyeth's internal documents revealed that it was pleased that its efforts resulted in the FDA's conclusion that the risk was uncertain. That same year, Wyeth provided its drug to the National Institutes of Health, which was conducting a study called the Women's Health Initiative (WHI). The WHI consisted of 27,000 postmenopausal women grouped into two substudies to assess the risks and benefits of taking estrogen plus progestin or

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[5] The record indicates that a relative risk of 4.4 means that the risk when using hormone therapy drugs is more than 4 times the normal risk.

estrogen alone as compared to a group taking only placebos. This long-term study was halted in 2002 because a significant number of women on the estrogen-progestin combination had developed cancer.

In 1994, Wyeth sought approval from the FDA to market Prempro. Along with its request, Wyeth submitted at least 14 different breast cancer studies, including a quantitative statistical analysis of 31 breast cancer studies performed at Wyeth's request. The FDA, relying on the studies, approved Prempro as safe and effective. Its approval, however, was conditioned on Wyeth conducting a large-scale clinical trial on bone mineral density and the breast cancer risk to obtain comprehensive answers about breast cancer. The breast cancer issue was highlighted as the most important issue concerning hormone therapy drugs. The FDA also recognized that it would take many years of studying the drug before the relationship between estrogen, progestin, and breast cancer could be definitively determined.

Prempro's approval was also conditioned on precise warning-label language. The FDA modified Wyeth's proposed warning label. The modified warning informed readers that "[s]ome studies have reported a moderately increased risk of breast cancer." The label noted that "[t]he effect of added progestins on the risk of breast cancer is unknown, although a moderately increased risk in those taking combination estrogen/progestin therapy has been reported." The label also stated that the rate of breast cancer that showed up in Wyeth's own human study did "not exceed that expected in the general population." Wyeth, however, never conducted its own human study.

With the launch of Prempro, Wyeth became the first pharmaceutical company to combine estrogen and progestin into one pill. Although Wyeth knew there were no long-term studies on the safety of estrogen plus progestin, it recommended Prempro's use for "all women for life."

A 1996 published European study showed that the estrogen-progestin combination increased the breast cancer risk for thin or lean women. Following that study, Wyeth updated its European label warning, but did not update its warning label in the United States. Wyeth specifically cautioned its "Breast Cancer Working Group" to keep the article "confidential, [and] not discuss [it] with anyone outside of Wyeth." Testimony indicated that Wyeth developed a plan to minimize the study and divert attention from it. Wyeth contended, however, that the marketing strategy to counter this European study was never utilized.

By 1997, Wyeth had not begun a comprehensive clinical trial, as required by the FDA. Even so, Wyeth requested and the FDA agreed that Wyeth could rely on the WHI study to fulfill its commitment.

By 2000, a number of published scientific articles linked hormone replacement drugs to an increased risk for breast cancer. Evidence showed that Wyeth responded to these articles by creating a task force and adding $40.4 million to its large yearly marketing budget to counter rising consumer awareness about the relationship between breast cancer risk and hormone replacement therapy. Wyeth also began promoting Prempro's unproven, and later debunked, heart and mental health benefits in television advertisements and informational pamphlets, guides, and textbooks. The promotional materials failed to mention any breast

cancer risk. The FDA admonished Wyeth for recommending its drugs for unapproved benefits as a violation of FDA regulations. As it pertained to those promotional materials, Wyeth disregarded the admonition, and the FDA never sanctioned Wyeth for the improper practices. In another situation involving different promotional materials that Wyeth intended to send to its hormone therapy consumers, Wyeth complied with the FDA's warnings to omit information about unapproved benefits.

Over the years, Wyeth sponsored 51 medical articles by selecting different physicians to author the articles, when in fact Wyeth personnel wrote the articles or provided the substance for the articles. Wyeth's involvement with those articles was never identified. Published under independent doctors' names, the 51 ghostwritten medical articles touted the benefits of hormone replacement therapy while minimizing the breast cancer risk.

In July 2002, the Prempro arm of the large-scale WHI study was terminated because the data showed an increased risk of invasive breast cancer, coronary heart disease, and stroke. The WHI study also concluded that estrogen plus progestin did not provide any cognitive benefit for women 65 and older, but actually caused a decline in cognitive functioning. Respondents' epidemiological expert testified that the use of estrogen plus progestin caused approximately 8,000 to 15,000 extra breast cancers each year for women between 50 to 69 years of age.

After the WHI study results were released, prescriptions for the standard dose of estrogen plus progestin dropped by 80 percent. Similarly, the number of diagnosed hormone-receptor-positive breast

cancers—cancers in which tumors show an active hormone receptor—also fell.

Following the WHI study, Wyeth introduced a new, lower dose estrogen-progestin pill called Prempro Low. This lower-dose treatment is recommended only as a second-line treatment and for the shortest duration necessary. It also carries the strongest warning possible—a "black box" warning—and informs the consumer that the risk of breast cancer increases with prolonged use.

With this background in mind, we discuss the procedural posture of the underlying district court case.

Trial testimony

The parties' causation theories

Expert testimony was presented from both sides regarding the cause of respondents' breast cancer. Respondents argued and presented evidence that, but for ingesting estrogen plus progestin, they would not have developed cancer. Wyeth countered that the cause of respondents' cancer is unknown, that the prescribed hormone therapy drugs did not cause their cancer, and that respondents had other risk factors for breast cancer.

Respondents' epidemiologist and oncologist testified that breast cancer can be caused either by initiation, where an agent damages a cell's DNA and causes the first abnormality, or by promotion, when a substance, such as Wyeth's hormone-therapy drugs, causes an already existing abnormal cell to grow from a benign lesion into cancer. The oncologist testified that hormone-deficient women, such as respondents, have a lower risk of developing hormone-receptor-positive breast cancer after menopause. The expert testified that the risk is low

because hormone-deficient women's bodies lack sufficient hormones to cause abnormal cells to grow into cancer. The oncologist stated that once the stimulus, *i.e.*, hormone replacement drugs, are removed, the hormone-positive tumors shrink. On cross-examination, respondents' epidemiologist testified, however, that after menopause, a women's chance of developing cancer increases even while the woman's hormone levels are naturally decreasing. Thus, according to the epidemiologist, the presence of an estrogen receptor does not consistently determine that a tumor's growth was caused by the estrogen receptor.

Respondents argued that the WHI study demonstrated that the rate of breast cancer with the use of hormone replacement therapy had a quadrupling of the relative risk; consistent with earlier studies, the WHI study initially indicated a relative risk of 1.24, but further analysis of the WHI study showed a 4.61 relative risk for women who took estrogen plus progestin for more than five years. Respondents' experts explained that this discrepancy occurred because not every woman who enrolled in the study abided by its terms. In other words, the 1.24 relative risk took into account the total number of women who enrolled in the study, but the 4.61 relative risk included only those women who stayed in the study and took the medication as directed. Wyeth acknowledged the risk, but insisted that the relative risk was only 1.24, which was less than the 1.3 to 2.0 risk that it provided in Prempro's warning label.

Respondents' oncologist also testified that respondents' tumors were studied and showed the presence of estrogen and progestin receptors. Thus, the oncologist testified that respondents' breast cancer was caused by hormones, as they had developed estrogen and

progestin receptor-positive breast cancer. Respondents argued that because they introduced hormones into their bodies, through the prescribed hormone therapy drugs, they were put at a greater risk for developing hormone-positive breast cancer. According to respondents' oncologist, but for taking the hormone therapy drugs, respondents would not have developed cancer.

Wyeth solicited evidence from respondents' oncologist and epidemiologist that science does not know exactly what causes breast cancer and that respondents had other risk factors for developing breast cancer. The specific risk factors included respondents' gender, their age, the denseness of their breasts, that each woman was a long-time smoker, that they all had previous biopsies to remove benign lesions, and the overall number of years that the women had menstrual cycles. Respondents' experts also testified on cross-examination that all three women had abnormal cells before taking the hormone replacement therapy. Respondents Rowatt and Forrester had an additional risk factor: they were both overweight. Testimony also showed, however, that respondents' physicians did not believe that respondents were at risk for cancer because they had no family history of breast cancer and none of them had ever taken birth control.

Respondents' oncologist, on direct examination, discounted the majority of respondents' existing risk factors. The expert testified, for instance, that respondents' dense breast tissue would not be a significant risk factor, as during menopause women tend to lose density in their breasts. On cross-examination, the oncologist conceded, however, that the same is not true for every woman. Respondents' oncologist and Wyeth's radiology expert disagreed as to whether

respondents' breast density had changed while on hormone replacement therapy.

Respondents' epidemiologist and cancer biologist physician testified that it could be anywhere from a few to 40 years for a benign lesion to turn into cancer. The oncologist explained that respondents' cancers were not detectable for years because the women did not have preexisting cancer cells. Thus, in respondents' case, it took years for the estrogen-progestin drug combination to fertilize respondents' abnormal cells and develop the cells into cancer. Further expert testimony was presented that recent medical literature confirmed that estrogen-progestin-receptor-positive cancers have an even higher statistical chance of recurrence than other breast cancers. At the time of trial, none of respondents' breast cancer had spread, and respondents were in remission.

Respondents' hormone replacement therapy history

Each respondent testified at trial as to how long she had been taking hormone therapy drugs. Respondent Rowatt testified that she had taken the drugs for a total of 7 years while living in Oregon and approximately 5 months after moving to Nevada; respondent Forrester, a Nevada resident, took the drugs for 9 years; and respondent Scofield took the drugs for 14 years while living outside Nevada, then for approximately 1 year after she moved to Nevada. Respondents were all diagnosed with breast cancer while living in Nevada.

Respondents testified regarding the affects their diagnoses had on them and their families; how, following their diagnoses, they underwent various surgeries to remove the cancer; and the resulting effects, both physical and mental, that they experienced from the

surgeries. Evidence was also presented about respondents' various post-surgery treatments, such as chemotherapy or radiation and projected years of medication necessary to prevent the recurrence of cancer. Respondent Forrester testified that she was unable to take any post-surgery medication due to the severe side effects.

As to the drug labels, respondent Rowatt testified that she knew there was a risk of breast cancer, but after discussing the risk with her doctor, she did not think that she was in the risk category because she did not take birth control pills and there was no family history of breast cancer. Respondent Forrester testified that she was unaware of any risks because her doctor failed to have that discussion with her; she never asked about any risks. Respondent Scofield testified that she never saw the drug's warning label, as she received her prescriptions at military bases, and she testified that the warning inserts were not provided. All three women testified that if they had known of the risk of breast cancer, they would not have taken the medication. Each of their health care providers testified that when they prescribed the hormone therapy drugs, they believed that the benefits outweighed the risks. Following the WHI study, their opinions changed.

Respondents further testified about their post-cancer lives. They all testified as to how they try to lead normal lives, but are always fearful that the cancer will return. Respondents' oncologist expert testified that there is always a possibility that the cancer could return.

The jury's verdict

At the close of evidence, the parties and the district court settled the jury instructions. Due to respondents'

objection to the bifurcation instruction, the district court did not inform the jury that a second trial would be held if the jury found that Wyeth acted with malice or fraud. Wyeth did not object. The parties agreed to a but-for causation instruction, yet, the district court gave a substantial-factor causation instruction. Wyeth objected, but the court responded by modifying its proposed substantial-factor causation instruction.

After the jury was instructed and the parties made closing arguments, the case was submitted to the jury. The jury returned verdicts in favor of respondents totaling $134.6 million in compensatory damages. The jury also found that Wyeth had acted with malice or fraud. Because the jury made this last finding, the court ordered the jury to return for a trial on punitive damages.

Before the punitive damages phase began, the district court learned and confirmed that the jury had awarded punitive damages along with the compensatory damages. Wyeth moved for a mistrial, which was denied. The district court reinstructed the jury on the law of compensatory damages, and the jury was directed to deliberate again, but solely on compensatory damages. It returned three compensatory damages awards totaling $35.1 million.

For the punitive damages phase, the jury was instructed on assessing punitive damages. Evidence was presented regarding Wyeth's financial condition and following deliberations the jury returned three punitive damages awards totaling $99 million.

Wyeth moved for a renewed judgment as a matter of law and a new trial or, in the alternative, remittitur. Respondents opposed the motions. The district court

denied the renewed motion for judgment as a matter of law and the new trial motion, but granted the remittitur. It reduced the compensatory damages to $23 million and the punitive damages to $57,778,909; respondents accepted the remittitur. This appeal followed. The Nevada Justice Association was granted leave to file an amicus brief in support of affirmance.

DISCUSSION

We begin our analysis by determining the threshold issue of whether the district court properly decided choice of law. We take this opportunity to provide Nevada courts with guidance for a choice-of-law analysis when a slow-developing disease is involved. This discussion is followed by Wyeth's challenges to the jury instructions. And finally, we address the compensatory and punitive damages awards.

Standard of review

This court reviews de novo a district court's denial of a motion for judgment as a matter of law. *Winchell v. Schiff*, 124 Nev. 938, 946-47, 193 P.3d 946, 952 (2008). We review a district court's decision to deny a new trial motion for an abuse of discretion. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). Appellate issues involving a purely legal question are reviewed de novo. *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 1215, 197 P.3d 1051, 1057 (2008).

The district court properly concluded that Nevada law applied

Wyeth contends that the district court erred when it determined that Nevada law applied to respondents Rowatt's and Scofield's claims because they lived in other states while taking Wyeth's hormone replacement

therapy, and thus, the laws of the states where they lived when the disease process began should have been applied to their claims. Respondents counter that Nevada constitutes the "legal" place of injury because the final event necessary to assert a claim against Wyeth did not exist until the women were diagnosed in Nevada with breast cancer. We agree with respondents.

This court has adopted the Restatement (Second) of Conflict of Laws, section 146, for determining the choice of law for personal injury cases. *General Motors Corp. v. Dist. Ct.*, 122 Nev. 466, 474, 134 P.3d 111, 117 (2006). Section 146's general rule provides that the state's law where the injury occurred governs the rights and liabilities of the parties. Restatement (Second) of Conflict of Laws § 146 (1971). To make a proper choice of law under section 146, the court must apply the section's general place-of-injury rule, unless a party presents evidence that another state has a more significant relationship with the alleged tortious conduct and the parties. *General Motors Corp.*, 122 Nev. at 474, 134 P.3d at 117. Section 146 has defined "personal injury" as "either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another." Restatement (Second) of Conflict of Laws § 146 cmt. b. More than one type of personal injury can arise from a single event. *Id.*

We have not yet defined what constitutes the place of injury for a slow-developing disease such as cancer, and we take the opportunity to do so now. Wyeth argues that courts have held that the place of injury for a slow-developing disease is the state where the disease process begins. *See Rice v. Dow Chemical Co.*, 875 P.2d 1213, 1218-19 (1994); *Clayton v. Eli Lilly and Co.*, 421 F. Supp.

2d 77, 79-80 (D. D.C. 2006); *Smith v. Walter C. Best, Inc.*, 756 F. Supp. 878, 880-81 (W.D. Pa. 1990); *Harding v. Proko Industries, Inc.*, 765 F. Supp. 1053, 1056-1057 (D. Kan. 1991). Other courts, however, have determined that the place of injury for slow-developing diseases is the place where the disease, or injury, was first ascertainable. *See generally Renfroe v. Eli Lilly & Co.*, 686 F.2d 642, 645-47 (8th Cir. 1982) (holding that there is no legally compensable injury to sue upon until a slow-developing disease is detected); *In re Joint Eastern & Southern Dist. Asbestos Lit.*, 721 F. Supp. 433, 435 (E.D. and S.D.N.Y. 1988) (concluding that the last act necessary for a claim against a tortfeasor refers to the place where the plaintiff became ill); *Trahan v. E.R. Squibb & Sons, Inc.*, 567 F. Supp. 505, 507 (M.D. Tenn. 1983) (recognizing that the "law of the state where injury was *suffered* controls," rather than the state's law where the tortious conduct occurred).

We reject the cases cited by Wyeth and adopt the analysis of the cases that recognize that the place of injury is the state where the slow-developing disease is first ascertainable, which is the last event necessary for a claim against a tortfeasor. Designating the place of injury as the state where the last element necessary for a claim against the tortfeasor occurs conforms to our definition of injury. *See Massey v. Litton*, 99 Nev. 723, 725-26, 669 P.2d 248, 250-51 (1983) (defining "injury," in the context of medical malpractice, as a legal injury in which the plaintiff has suffered damages and knows or has reason to know of the health care provider's negligence). This analysis will also guide district courts in making a choice-of-law decision when a slow-developing disease is involved. The rule adopted in this opinion is preferable to Wyeth's approach because until a

slow-developing disease is detected, there is no legally compensable injury to sue upon.[6]

For example, in *Renfroe v. Eli Lilly & Co.*, 686 F.2d 642, 645 (8th Cir. 1982), the Eighth Circuit Court of Appeals affirmed the lower court's determination that the plaintiffs' injuries occurred in the state where their injuries were ascertainable. The lower court specifically recognized that a cause of action does not accrue until the "final element of the cause of action occurs." *Id.* at 645. The *Renfroe* plaintiffs were exposed to the defendants' anti-miscarriage drug while in utero. *Id.* at 644. Both plaintiffs' exposure occurred in Missouri and both plaintiffs eventually moved to California, where their cervical cancers were diagnosed. *Id.* The plaintiffs filed suit against the defendants, who moved for summary judgment on the basis that the plaintiffs' claims were barred by the relevant statute of limitations. *Id.* at 644-45. The lower court ultimately found that the plaintiffs' claims did not originate in Missouri, where the exposure to the harmful drug occurred, but where the plaintiffs' damages were sustained and capable of determination. *Id.* at 646. In affirming the lower court, the *Renfroe* court noted that the plaintiffs' damages claims were not based on the physiological or genetic injuries sustained in utero, but rather on the development of cancer and resulting surgeries. *Id.* at 647. Thus, the *Renfroe* court held that the plaintiffs' injuries originated in the state where their cancer had developed and was ascertainable. *Id.*

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[6] Our adoption of the "last event necessary" test for the place-of-injury rule is not to be confused with the plaintiffs discovery of his or her illness, which implicates the beginning of the limitation period. *Asbestos Lit.*, 721 F. Supp. at 435.

Turning to the present case, the record shows that respondents Rowatt and Scofield were both exposed to estrogen plus progestin for a number of years while living in other states, however, the last event necessary to give rise to their claims against Wyeth occurred in Nevada, when the women were diagnosed with cancer. Their cancer was not detected while they lived in other states, even though the cancerous tumors may have been developing while they lived in those states.

This does not conclude the choice-of-law inquiry. Under Restatement section 146, if a party submits sufficient evidence that another state's law applies based on the parties' relationship and the tortious conduct, we move past the general place-of-injury rule. *See General Motors Corp. v. Dist. Ct.*, 122 Nev. 466, 474, 134 P.3d 111, 117 (2006). Here, Wyeth argues that Nevada does not have a significant relationship to the alleged tortious conduct, as respondents Rowatt and Scofield ingested the hormone therapy drugs for 7 and 14 years, respectively, while living in other states. We conclude, however, that these facts are not sufficient to demonstrate that states other than Nevada have a more significant relationship.

Specifically, after moving to Nevada, the women continued taking the hormone therapy drugs. Respondents Rowatt and Scofield were diagnosed with breast cancer in Nevada, and they were Nevada residents at that time. They underwent the physical and emotional pain and suffering of their breast cancer surgeries and post-surgery medical treatments in Nevada. Since their surgeries, both women have had follow-up medical care, in Nevada, to detect if their breast cancers had returned. No evidence was presented that either respondent has moved from Nevada. Thus,

even under the most-significant-relationship test, we conclude that Nevada law applies, as Wyeth failed to demonstrate that another state has a more significant relationship to the women's injuries or the parties' relationship.

Because we conclude that the place of injury for respondents Rowatt and Scofield was in Nevada and that Nevada has the most significant relationship to the injuries and parties' relationship, we thus conclude that the district court did not err or abuse its discretion in denying Wyeth's motion for judgment as a matter of law or a new trial based on choice of law.[7]

The district court did not abuse its discretion when it modified the causation instruction, but the evidence supported a but-for causation instruction

Wyeth raises two challenges to the causation instruction given by the district court to support its contention that a new trial is warranted. First, it argues that the district court abused its discretion in giving a substantial-factor causation instruction instead of a but-for causation instruction. Second, Wyeth contends that the abuse of discretion was compounded when the district court amended the substantial-factor instruction

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[7] We also conclude that the district court did not abuse its discretion in submitting the statute of limitations questions to the jury, as the district court properly found that material questions of fact existed. *Allstate Insurance Co. v. Miller*, 125 Nev. ___, ___, 212 P.3d 318, 322 (2009) (recognizing that when questions of fact exist concerning a triable issue, the district court does not abuse its discretion when it submits the questions to the trier of fact for resolution); *Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998) (providing that when a claimant discovered or should have discovered the facts constituting a cause of action is a question of fact for the jury).

to adopt respondents' theory of causation, which rendered the instruction partial and prejudicial.

At the close of testimony, both parties requested that the jury be instructed that Wyeth could be held liable for respondents' injuries if the jury determined that, but for taking Wyeth's drugs, respondents would not have developed breast cancer. Despite the parties' request, the district court concluded that a substantial-factor causation instruction was warranted because sufficient evidence was presented to the jury to suggest that there were multiple causes of respondents' breast cancer. Wyeth objected to the court's proposed instruction, which the district court overruled. The district court modified the "substantial-factor" pattern jury instruction by tailoring it to the evidence presented. The pattern instruction states that "[a] legal cause of injury, damage, loss, or harm is a cause which is a substantial factor in *bringing about* the injury, damage, loss, or harm." Nev. J.I. 4.04A (emphasis added). The district court replaced "bringing about" with "producing or promoting."

The district court's decision to give or refuse a particular instruction will not be overturned absent an abuse of the district court's discretion or judicial error. *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 735-36, 192 P.3d 243, 250 (2008). "A party is entitled to an instruction on every theory that is supported by the evidence, and it is error to refuse such an instruction when the law applies to the facts of the case." *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001); *accord Posas v. Horton*, 126 Nev. ___, 228 P.3d 457 (2010). A district court is not bound by the suggested language of the standard instructions and is free to adapt them to fit the circumstances of the case. *In re Prempro Products Liability Litigation*, 586 F.3d 547, 567-68 (8th

Cir. 2009); *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511, 517 (1998). A but-for causation instruction applies when each party argued its own theory of causation, the two theories were presented as mutually exclusive, and the cause of the plaintiff's injuries could only be the result of one of those theories, but not both. *Johnson v. Egtedar*, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996). A substantial-factor causation instruction is appropriate when "an injury may have had two causes, either of which, operating alone, would have been sufficient to cause the injury."[8] *Id.* at 435, 915 P.2d at 275-76.

The causation theories advanced by the parties were mutually exclusive. Respondents presented evidence that Wyeth's drugs were the sole cause of their injuries. Wyeth countered by presenting evidence refuting that claim on the basis that science has not yet determined what causes cancer and that respondents had numerous risk factors that increased their chances of developing cancer without taking the hormone replacement medication. Although Wyeth elicited testimony from respondents' experts that respondents had other risk factors for developing breast cancer, respondents' experts gave little significance to those factors. Thus, contrary to the district court's conclusion, the evidence supported a but-for causation instruction. We conclude, however, that the error was harmless.

An error is harmless when it does not affect a party's substantial rights. NRCP 61. When an error is harmless,

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[8] We leave open the issue of whether the substantial-factor instruction applies in negligence cases. *See Mitchell v. Gonzales*, 819 P.2d 872, 878 (1991) (holding that the "substantial factor" jury instruction subsumes the "but for" instruction in negligence cases).

reversal is not warranted. *Id.*; *see also Countrywide Home Loans*, 124 Nev. at 747, 192 P.3d at 257. But if the moving party shows that the error is prejudicial, reversal may be appropriate. *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1006-07, 194 P.3d 1214, 1219-20 (2008). To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached. *Id.* at 1007, 194 P.3d at 1220; *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971). The inquiry is fact-dependent and requires us to evaluate the error in light of the entire record. *Carver v. El-Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005); *Boyd v. Pernicano*, 79 Nev. 356, 359, 385 P.2d 342, 343 (1963).

Here, the appellate record shows that during trial, evidence was presented that respondents were hormone-deficient women; however, respondents were diagnosed with estrogen-progestin-receptor-positive breast cancer only after taking Wyeth's Premarin and a progestin pill or Wyeth's Prempro for many years. In other words, the cells in respondents' breast tissue responded to the presence of hormones in respondents' bodies. The hormones present in their bodies, however, were the result of ingesting Premarin and progestin or Prempro. Thus, the jury concluded that Wyeth's drugs caused respondents' cancer tumors.

Scientific evidence supported the jury's conclusion. The WHI study showed an increased risk of invasive breast cancer with the use of estrogen and progestin and a 4.61 relative risk for women who took estrogen plus progestin longer than 5 years, meaning that respondents, who took the drugs for more than 5 years, had more than 4 times the normal risk of developing

breast cancer. Even Wyeth classified this as a substantial risk. The post-WHI label now warns that "[t]he excess risk [of breast cancer] increased with duration of use." After the WHI study was published, those breast cancer cases commonly associated with hormone therapy dropped significantly. Thus, the district court's instructional error was harmless, as it did not substantially affect Wyeth's rights, and reversal is not supported based on this contention.

Finally, Wyeth argues that the district court abused its discretion by amending the substantial-factor instruction to adopt the language of respondents' experts by substituting "promotion" into the instruction's language, which represented respondents' theory of causation. Wyeth contends that in doing so, the district court diluted the concept of causation and rendered the instruction both partial and prejudicial. Respondents support the district court's modification, as they assert that it was within the district court's broad discretionary authority to tailor the instruction to fit the evidence presented.

At trial, respondents' epidemiologist expert testified that the concept of "promotion" is recognized in epidemiological textbooks as a mechanism for causation. Experts for both parties recognized the scientific theory that breast cancer can be caused either by initiation, whereby an agent damages the DNA of a cell and causes the first abnormality, or by promotion, which occurs when a substance causes an abnormal cell to grow from a benign lesion into cancer. Because neither respondents nor Wyeth alleged initiation, the district court limited the instruction to promotion. Wyeth's experts may have contested whether its drugs caused breast cancer through promotion, but its experts nonetheless

recognized the scientific principle of promotion. Accordingly, the district court's decision to give the modified causation instruction was not an abuse of discretion, as it was tailored to comply with existing scientific consensus and was consistent with the evidence presented at trial.[9]

Compensatory and punitive damages awards

Wyeth primarily raises two arguments concerning the district court's compensatory and punitive damages awards. First, Wyeth argues that its compliance with federal regulations negates the imposition of punitive damages. Second, Wyeth argues that the awards are not supported by substantial evidence and that, even after remittitur, they are excessive.

Compliance with applicable regulatory standards does not automatically insulate a defendant from punitive damages

Wyeth argues that because it complied with all FDA requirements for labeling and testing its drugs, the imposition of punitive damages is negated. Wyeth points out that its position on the breast cancer risk reflected the available scientific evidence, which at the time, provided sufficient warning about the breast cancer risk, and at any rate, its drug remains FDA approved and

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[9] We do not consider Wyeth's argument that the district court improperly gave a life-expectancy jury instruction when neither party requested it because Wyeth failed to provide authority to support its argument. *Mainor v. Nault*, 120 Nev. 750, 777, 101 P.3d 308, 326 (2004). As to Wyeth's argument that the given instruction misled the jury because it was not aware that respondent Forrester had terminal lung cancer, we conclude that reversal is not warranted on this issue because the district court reduced the compensatory damages awards.

continues to be prescribed. Wyeth urges this court to follow a line of cases that hold that compliance with FDA regulations negates malice such that punitive damages should not be awarded. We decline to do so.

While the cases cited by Wyeth allowed the defendants to avoid punitive damages by complying with federal standards, those cases' holdings are inapplicable to the facts presented in this case. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (holding that compliance with federal and industry standards is "some evidence of due care" and that insufficient evidence was presented to demonstrate that the tire manufacturer failed to warn, as the manufacturer complied with both standards); *Nader v. Allegheny Airlines, Inc.*, 626 F.2d 1031, 1035 (D.C. Cir. 1980) (concluding that punitive damages were not warranted when the airline complied with federal standards and such standards were in the public's interest); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1348 (D. Utah 1996) (holding that the adequate warning, which complied with OSHA standards, did not justify an award of punitive damages); *In re Miamisburg Train Derailment*, 725 N.E.2d 738, 752 (1999) (stating that although compliance with industry standards did not negate negligence, such compliance negated the lower court's finding that defendants consciously disregarded the safety of others). Unlike these cases, Wyeth's conduct was fraught with reprehension and deception, and if this court adopts the policy that Wyeth seeks, potentially every company that complied with federal regulations would be absolved of punitive damages, regardless of the manner in which those requirements were allegedly satisfied. *See Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1456-58 (10th Cir. 1985) (upholding punitive damages award

despite defendant's compliance with federal nuclear safety regulations); *Gonzales v. Surgidev Corp.*, 899 P.2d 576, 590 (1995) (holding that "compliance with federal regulations does not preclude a finding of recklessness or an award of punitive damages"); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 734-35 (Minn. 1980) (determining that compliance with the Flammable Fabrics Act of 1953, while relevant to the issue of punitive damages, does not preclude a punitive damages award as a matter of law).

Other courts have recognized that FDA regulations for drug manufacturers are generally viewed as establishing minimum standards for product design and warning. *Rite Aid v. Levy-Gray*, 876 A.2d 115, 132 (Md. Ct. Spec. App. 2005); *see also Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981) (recognizing that FDA approval of warning language is not necessarily conclusive on the question of the warning's accuracy). The United States Supreme Court has recognized that under the FDA's regulations, a drug manufacturer is responsible for the content of its drug label and ensuring that the warning remains adequate as long as the drug is on the market. *Wyeth v. Levine*, 555 U.S. ___, ___, 129 S. Ct. 1187, 1197-98 (2009). Thus, if a drug manufacturer knows, or has reason to know, of increased dangers that are not already identified in its drug's label, compliance with the FDA's minimal standard may not satisfy its duty to warn. *Stevens*, 507 P.2d at 661; *McEwen v. Ortho Pharmaceutical Corporation*, 528 P.2d 522, 534 (Or. 1974).

Although Wyeth presented evidence that its drug label warned women and physicians that there was a risk of breast cancer, these warnings were inadequate because they were misleading. Evidence was presented

that Wyeth financed and manipulated scientific studies and sponsored medical articles to downplay the risk of cancer while promoting certain unproven benefits. The evidence demonstrated that Wyeth used these same publications to mislead respondents' physicians. Additionally, Wyeth recommended and promoted its drug for "all women for life," knowing that a large, long-term study was needed to definitively address breast cancer risks associated with its products. The studies that were developed over the years demonstrated that the breast cancer risk increased over time. While estrogen-progestin hormone therapy remains approved by the FDA and is still available on the market, Wyeth's particular drug, Prempro, is in a new lower dosage and carries a more serious warning that recommends its use only as a second-line treatment and for short durations. Therefore, we reject Wyeth's contention that compliance with FDA standards negates its liability for punitive damages, as Wyeth should not be able to benefit from its malicious and deceptive practices. *See State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (holding that punitive damages are aimed at deterrence and retribution).

The compensatory and punitive damages awards are supported by substantial evidence and are not excessive

Procedural overview

To understand Wyeth's damages arguments, we begin our discussion with a brief overview of the underlying damages phases of the proceedings. In particular, after deliberations, the jury returned verdicts in the amount of $134.6 million in compensatory damages. The jury found that Wyeth was negligent, its products were defective, and that Wyeth concealed

material facts about its products' safety. Thus, the jury found that Wyeth's drugs and actions were a legal cause of respondents' injuries. The jury also found that respondents established by clear and convincing evidence that Wyeth acted with malice or fraud. Because of this last finding, the jury returned for a second trial regarding punitive damages.

Before the punitive damages phase began, the district court discovered that punitive damages were inadvertently awarded in the trial's first phase. Wyeth moved for a mistrial, which was denied. The district court subsequently reinstructed the jury and required it to redeliberate solely on compensatory damages. Thereafter, the jury returned a compensatory damages award of $35.1 million for all three respondents.

The jury received subsequent instructions on assessing punitive damages for the second phase of trial. Evidence was presented regarding Wyeth's financial condition. After deliberating, the jury returned punitive damages awards that totaled $99 million. Wyeth moved the district court for a new trial based, in relevant part, on irregularities in the deliberations. In the event that the district court denied Wyeth's new trial motion, it also requested that the district court reduce both damages awards. Respondents opposed Wyeth's motions. The district court denied Wyeth's motion for a new trial, but granted the motion for a remittitur. Respondents accepted the remittitur.

As to remitting the compensatory damages awards, the district court found that little evidence was presented regarding respondents' actual damages. The parties had stipulated to the amount of respondents' past medical bills, but no evidence was presented as to the cost of any future medical expenses. The district court

recognized that the compensatory damages awards were primarily for respondents' pain, suffering, and emotional distress. The court also found that the jury's premature deliberation of punitive damages impacted the compensatory damages awards. Thus, the district court concluded that the compensatory damages verdicts were the result of passion and prejudice.

The district court thereafter remitted the compensatory damages awards from $35.1 million to $23 million. In remitting the awards, the district court reduced the past damages awards from approximately $7.5 to about $4.5 million. As for future damages, the district court reduced the $36 million awarded to respondents Rowatt and Scofield to $3 million and $2.75 million, respectively, and remitted respondent Forrester's future damages award from $40 million to $3.4 million. When it reduced the compensatory awards, the district court noted that it was not discounting the significant injuries respondents suffered. It recognized that respondents' cancer diagnoses had serious lifelong physical and emotional consequences and that there existed the possibility of recurrence.

With regard to reducing the punitive damages awards, the district court abated those verdicts from $31 to $10 million for respondent Rowatt, $33 to $12 million for respondent Scofield, and $35 to $13 million for respondent Forrester. This decision was based on evidence that Wyeth provided a breast cancer warning, although arguably inadequate, and that it sponsored some limited testing. Respondents accepted the remittitur of $57.8 million in punitive damages.

Standard of review

This court will affirm a damages award that is supported by substantial evidence. *Foster v. Dingwall*, 126 Nev. ___, ___, 227 P.3d 1042, 1045 (2010) (compensatory damages); *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006) (punitive damages). We will reverse or reduce the amount of an excessive compensatory damages award that was "given under the influence of passion or prejudice" and when it shocks our conscience. *Bongiovi*, 122 Nev. at 577, 138 P.3d at 448; *Hernandez v. City of Salt Lake*, 100 Nev. 504, 508, 686 P.2d 251, 253 (1984). When considering a damages award, we presume that the jury believed the evidence offered by the prevailing party and any inferences derived from the evidence. *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008).

Compensatory damages awards

Wyeth argues that the compensatory damages awards are not supported by substantial evidence as respondents presented little evidence of actual past and future damages, and thus, the awards are excessive as they are disproportionate to the injuries suffered.

Based on our review of the appellate record, we conclude that substantial evidence supports the compensatory damages awards and that the reduced awards are not excessive. A jury is given wide latitude in awarding special damages. *Id.* at 737, 192 P.3d at 251. Damages for pain and suffering are peculiarly within the jury's province. *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984).

Respondents all developed a debilitating disease, breast cancer, as a result of Wyeth's actions, or lack thereof. The evidence supported the jury's finding that

Wyeth was negligent in failing to conduct appropriate studies on breast cancer and that it concealed material facts about its products' safety. The evidence showed that Wyeth knew in the mid-1970s that certain body organs, such as breast tissue, responded negatively to hormones. Yet Wyeth failed to conduct or participate in any meaningful study of the estrogen-progestin drug combination until it gave its drug to the WHI study in 1992. Wyeth knew also, by the late 1970s, that physicians were commonly prescribing the drug combination to treat menopause and prevent osteoporosis. And when published medical studies linked estrogen-progestin hormone therapy to an increased breast cancer risk, Wyeth sought to downplay the studies' results and divert attention from the information.

Experts testified that respondents were hormone deficient, yet estrogen and progestin receptors were present in their tumors. Because of the hormone receptors in respondents' tumors, the fact that respondents' were hormone deficient, and the fact that they were taking hormone therapy drugs, respondents' experts concluded that the drugs caused their cancers.

Respondents testified that their cancer diagnoses had a devastating impact on them and their families. Two of the women underwent a mastectomy and one a lumpectomy; all underwent the removal of lymph nodes to detect if their cancer had spread. Respondent Rowatt's hospital stay was longer due to her preexisting heart condition, as she had to be removed from her blood thinning medication before she could go into surgery and had to be put back on the medication after the surgery.

After their surgeries, respondents suffered through various aftereffects. Because of the fluid collection in their body, each respondent had to wear breast drains

for several weeks. The removal of their lymph nodes caused numbness in their arms; respondent Rowatt's numbness is permanent and she has a hole under her arm where the lymph nodes were removed. The surgeries left scarring, which respondent Scofield testified is a daily reminder of her cancer. Two of the respondents underwent chemotherapy and one radiation. Each respondent was also prescribed medication to prevent the recurrence of the cancer. Respondent Forrester experienced a painful side effect from the medicine, which prevented her from functioning normally; she had to discontinue the medication.

While respondents were given good prognoses following their treatments, expert testimony suggested that there is always a chance that the cancer may return, even 20 years later. They each testified that while they have been in remission, they persistently worry and fear that the cancer will return. Respondent Rowatt and her husband testified that she tries to lead a normal life, but finds herself doing all that she can because she is not sure of what her future holds. Respondent Scofield testified that her cancer is like a shadow that knows she is afraid of it and that follows her everywhere. Testimony was presented that respondents' future medical treatment involved regular blood tests and mammograms.

Based on the evidence presented to the jury, we conclude that the compensatory damages awards after remittitur are not excessive because they are supported by substantial evidence and the awards do not shock our conscience.[10] *Bongiovi*, 122 Nev. at 577, 138 P.3d at 448;

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[10] Wyeth attempts to argue that the damages awards are excessive as compared to damages awards rendered in similar cases. Any such consideration would be an abuse of discretion. *See Wells, Inc. v.*

Hernandez, 100 Nev. at 508, 686 P.2d at 253; *see generally Deloughery v. City of Chicago*, 422 F.3d 611, 616-17, 619 (7th Cir. 2005) (recognizing that when the defendant's motion for remittitur is granted and the plaintiff accepts the remittitur, the defendant may still challenge the amount of the remittitur as excessive). Thus, because the reduced compensatory damages awards are not excessive, we conclude that the district court did not abuse its discretion in denying Wyeth's motion for a new trial. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007) (providing that a district court's decision regarding a new trial motion is reviewed for an abuse of discretion).[11]

Shoemake, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947). Thus, we reject this argument on appeal.

[11] We reject Wyeth's contention that the jury's compensatory damages verdict was further tainted by passion and prejudice because the jury improperly considered potential harm to nonparties based on respondents' closing arguments. In particular, respondents in closing stated that Wyeth's drugs caused a sufficient number of deaths or injuries to fill two football stadiums and that the decrease in breast cancer rates was attributable to the drop in estrogen-progestin prescriptions after the WHI study was released. To determine whether a defendant's conduct is so reprehensible as to warrant the imposition of punitive damages, a jury may consider evidence of actual harm to nonparties, as that may show that the defendants' conduct, which harmed the plaintiffs, may also present a substantial risk to the general public. *See Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). Further, Wyeth's argument that the district court improperly refused to prohibit respondents' counsel from reading the "Race for the Cure" poem to the jury in closing arguments lacks merit. To the extent that the complained-of closing arguments inflamed the jury's passion and prejudice against Wyeth, we conclude that the district court properly reduced the respondents' compensatory damages award in light of the conflicting evidence presented, as previously discussed.

Punitive damages awards

Substantial evidence supports the jury's finding of malice

Wyeth argues that its explicit and detailed warnings about breast cancer risk associated with its products accurately reflected then-existing science and disclosed the limits of that knowledge. Wyeth argues that malice could not exist because its drugs are safe and to this day, Prempro and Premarin remain FDA-approved and continue to be prescribed. Respondents contend that Wyeth's warning labels were inadequate because they gave false assurances.

A plaintiff may recover punitive damages when evidence demonstrates that the defendant has acted with "malice, express or implied." NRS 42.005(1). "'Malice, express or implied,' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3). A defendant has a "[c]onscious disregard" of a person's rights and safety when he or she knows of "the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 42.001(1). In other words, under NRS 42.001(1), to justify punitive damages, the defendant's conduct must have exceeded "mere recklessness or gross negligence." *Thitchener*, 124 Nev. at 742-43, 192 P.3d at 254-55.

The evidence shows that while the words "breast cancer" appear ten times in the Prempro label, in many instances the term appeared in reassuring statements. For instance, the warning stated that the relationship between progestin and breast cancer is unknown, that the majority of studies show no increase in breast cancer

risk, and that the rate of breast cancer that showed up in Wyeth's human study did "not exceed that expected in the general population." To the contrary, the evidence showed that before Prempro was marketed, there was scientific data that confirmed an increased risk in breast cancer with the prolonged use of estrogen plus progestin. Respondents also presented evidence that Wyeth never conducted a human study. Testimony showed that Wyeth spent $200 million each year marketing these drugs, but did not perform sufficient drug testing regarding breast cancer and its products to determine whether they were safe to use.

Evidence further demonstrated that Wyeth financed and manipulated scientific studies and sponsored articles that deliberately minimized the risk of breast cancer while promoting other unproven benefits. It also implemented a policy to dismiss scientific studies that showed any link between breast cancer and hormone therapy drugs and to distract the public and medical professionals from the information as well.

Over the years, Wyeth organized task forces to contain any negative publicity about hormone therapy and breast cancer. Wyeth's strategy to undermine scientific studies linking an increased risk of breast cancer to estrogen-progestin hormone therapy included ghostwriting multiple articles. The evidence further showed that Wyeth worked to keep a European study that exposed the unusually high breast cancer risk for thin women confidential. As a result of the study, Wyeth updated its European warnings, but never updated its United States labels. As respondent Scofield is a thin woman, this additional warning would have applied to her. The Prempro Low, which is available to consumers today, carries the strongest warning possible, and its use

is suggested only as a second-line treatment for a short duration.

Based on the warning's language and Wyeth's actions, we conclude that a jury could reasonably determine that while Wyeth warned of breast cancer, it also tried to hide any potential harmful consequences of its products. Thus, substantial evidence supports the jury's conclusion that Wyeth acted with malice when it had knowledge of the probable harmful consequences of its wrongful acts and willfully and deliberately failed to act to avoid those consequences such that punitive damages were warranted.[12]

The punitive damages awards are not excessive

Wyeth alternatively contends that the awards should be reversed because its due process rights have been violated, as the awards are purportedly excessive. Respondents disagree.

Whether a punitive damages award violates a defendant's due process rights is subject to de novo review. *Bongiovi v. Sullivan*, 122 Nev. 556, 582-83, 138 P.3d 433, 451-52 (2006). Awards of punitive damages are generally limited by procedural and substantive due process concerns. *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). The Fourteenth Amendment's Due Process Clause prohibits punitive damages awards that are grossly excessive or arbitrary. *Id.*; *Bongiovi*, 122 Nev. at 582, 138 P.3d at 451. When reviewing punitive damages awards, we consider three

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[12] Because we conclude that the finding of malice was supported by substantial evidence, we do not need to consider whether the finding of fraud was also supported.

guideposts: "(1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and (3) how the punitive damages award compares to other civil or criminal penalties that could be imposed for comparable misconduct." *Bongiovi*, 122 Nev. at 582, 138 P.3d at 451-52 (internal quotations and citations omitted).

As to the reprehensibility of Wyeth's conduct, the harm caused in this case was physical—breast cancer and its resulting surgeries and treatment. Wyeth's misrepresentations and concealment of data showed reckless disregard for the health and safety of the users of its drugs. Its conduct involved repeated actions in that the evidence supported many examples of it misrepresenting the risks and benefits of its products. The harm suffered by respondents was the result of Wyeth's malicious activities and deceit.

Regarding the ratio of the punitive damages awarded to the compensatory damages awards, the remitted punitive damages awards here are less than three times the compensatory awards. This is well within the accepted ratios. *See* NRS 42.005(1)(a).

As to how the punitive damages awards compare to other civil penalties that could be imposed for comparable misconduct, Wyeth notes that the most pertinent Nevada civil sanction for engaging in deceptive trade practices is $5,000. Respondents' regulatory expert testified, however, that fines can be imposed against a manufacturer for marketing unproven benefits. She testified that a recent comparable fine for a company that promoted its drug for unapproved benefits was $600 million. We reject Wyeth's arguments and conclude that the reduced punitive damages awards are well within

NRS 42.005's statutory parameters. The awards are both reasonable and proportionate to the amount of harm caused to respondents and to the compensatory damages award. Thus, the remitted punitive damages awards do not violate Wyeth's due process rights.

Because the punitive damages awards do not violate Wyeth's due process rights, we now consider whether reversal is nevertheless warranted because of the improper jury deliberations.

The jury's improper deliberations were cured

Finally, Wyeth challenges the punitive damages awards based on a purported procedural due process violation. Wyeth argues that the jury's verdict should be reversed and remanded to the district court for further proceedings because the jury improperly deliberated and awarded punitive damages without receiving proper instructions. Respondents argue that while the jury improperly considered punitive damages, the problem was corrected when the district court required the jury to deliberate the compensatory damages a second time.

During the settling of the jury instructions, the district court informed the parties that it was going to instruct the jury that should it find that malice or fraud existed, a second proceeding would take place. Respondents objected, as it would have a prejudicial effect on the jury if it knew that it would have to return for another proceeding. Thus, respondents urged the district court to remove the instruction, and Wyeth did not object.[13] The jury was given an instruction regarding

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[13] We need not consider Wyeth's argument that a new trial is warranted when the district court failed to instruct the jury that there would be two phases of trial because the issue was not

whether Wyeth acted with malice or fraud. The jury was not instructed to deliberate and consider awarding any punitive damages.

By statute, Nevada requires that the liability determination for punitive damages against a defendant be bifurcated from the assessment of the amount of punitive damages, if any, to be awarded. NRS 42.005(3); *see generally Smith's Food & Drug Cntrs. v. Bellegarde*, 114 Nev. 602, 606, 958 P.2d 1208, 1211 (1998), *overruled on other grounds by Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008). This court has recognized a strong public policy in favor of the district court correcting verdicts before discharging a jury. *See Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1111, 197 P.3d 1032, 1038 (2008); *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 273, 628 P.2d 681, 682 (1981). "The efficient administration of justice requires that any doubts concerning a verdict's consistency with Nevada law be addressed before the court dismisses the jury." *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000). A jury's verdict should be salvaged, when possible, to avoid a new trial. *Id.* at 583, 3 P.3d at 670.

Here, the district court properly bifurcated the underlying proceedings. The jury was instructed on liability and compensatory damages, and asked to determine if Wyeth could be held liable for punitive damages. Neither the instructions nor the verdict form requested that the jury award an amount for punitive damages, even if it found that Wyeth acted with malice or fraud. When the district court learned that the jury

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preserved for appellate review. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

awarded punitive damages in the trial's first phase, the court reinstructed the jury and sent them back to deliberate compensatory damages a second time. The district court properly attempted to salvage the jury's verdict so as to avoid a new trial.

The district court later recognized, however, that the premature jury deliberations on punitive damages had significantly tainted the jury's verdicts as being the result of passion and prejudice. This is evident from the fact that in the first initial deliberations, the jury returned verdicts totaling $134.5 million, which improperly included an award for punitive damages. After being reinstructed on compensatory damages, the jury returned three verdicts totaling $35.1 million. Thereafter, the jury awarded punitive damages that totaled $99 million. Combined, the two awards amount to $134.1 million, only $500,000 less than their original award. Because the awards were still tainted by the jury's passion and prejudice, the district court granted Wyeth's motion to reduce the awards. The district court reduced the jury's punitive damage verdict from $35 to $13 million for Ms. Forrester, from $31 to $10 million for Ms. Rowatt, and from $33 to $12 million for Ms. Scofield.

Thus, while the jury's improper deliberations may not have been salvaged in light of the subsequent punitive damages awards, the verdicts were spared when the district court granted the remittitur and reduced the awards. Therefore, the district court did not abuse its discretion in reinstructing the jury and then denying Wyeth's new trial motion because it salvaged the verdicts by granting the remittitur. *See Lehrer*, 124 Nev. at 1110, 197 P.3d at 1037-38 (reviewing a district court's

decision regarding a jury verdict for an abuse of discretion).[14]

CONCLUSION

The district court did not err or abuse its discretion in denying Wyeth's motions for judgment as a matter of law or its motion for a new trial, and therefore, we affirm the district court on all issues presented.

We concur: PARRAGUIRRE, C.J., HARDESTY, DOUGLAS, SAITTA, and GIBBONS, JJ.

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[14] Wyeth also argues that the district court erroneously granted attorney fees to respondents pursuant to NRS 17.115 and NRCP 68 because it rested on an error about prior verdicts and a conclusory assertion that Wyeth had acted in bad faith, without the evaluation of the factors required in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The record reflects, however, that the district court properly considered the *Beattie* factors, and thus, no abuse of discretion occurred. *See Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001) (reviewing an award of attorney fees under NRS 17.115 and NRCP 68 for an abuse of discretion); *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252 n. 16, 955 P.2d 661, 673 n. 16 (1998) (providing that no one *Beattie* factor is determinative).

APPENDIX B

SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA
FOR THE COUNTY OF WASHOE

No. 04-01699

ARLENE ROWATT, PAMELA FORRESTER AND
JERALDINE SCOFIELD, Plaintiffs,

v.

WYETH, Defendants.

February 19, 2008

PERRY, District Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR REMITTUR OR A NEW TRIAL

Before the Court is Defendant, Wyeth's Motion for Remittur or a New Trial. The Court does not lightly deviate from the jury's verdict. Nevertheless, based on the applicable law and an extended and considered analysis of the evidence, the Court is compelled to grant Defendant's Motion.

I. COMPENSATORY DAMAGES

Plaintiffs' offered very limited evidence and argument in support of compensatory damages. The only evidence of special (actual) damages was the stipulated amount of each Plaintiffs' past medical bills.[1] There were no lost wages or any other actual losses presented to the jury.

Likewise, there was no evidence of any future costs for medical care, psychological counseling or expenses of any kind. See, *Curtis v. Franceschi*, 60 Nev. 422, 111 P.2d 53 (1941). There was evidence which would support the conclusion that the Plaintiffs would require medical monitoring, were at risk for re-occurrence of this cancer and that each had permanent injuries and disfigurement sufficient to support an award of future damages.

The great bulk of Plaintiffs' compensatory damages, past and future, were for pain, suffering and emotional distress commonly known as "general damages". The Court is well aware that the amount of general damages is a matter commonly described as "peculiarly within the provence of the jury", especially where there is no conflict as to the extent of the Plaintiff's injuries. *Canierino v. The Mirage-Casino Hotel*, 117 Nev. 19, 24, 16 P.3d 415 (2001). Nevertheless, a trial Court is required to revisit the jury's award of general damages where it appears "flagrantly improper", so as to

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[1] Plaintiffs' medical expenses were:

Mrs. Rowatt:	$57,027.00
Mrs. Forrester:	$62,489.71
Mrs. Scofield:	$10,401.48

"indicate passion, prejudice or corruption". *Id.*[2] It appears that the jury's feelings regarding punitive damages impacted its award of compensatory damages.

The jury's award of $7,557,027.00 in past damages to Mrs. Rowatt, $7,561,481.00 to Mrs. Forrester and $7,510,401.00 to Mrs. Scofield represented 132 times actual damages in Mrs. Rowatt's case, and multiples of 121 times for Mrs. Forrester and 751 times in Mrs. Scofield's case. The Court is compelled to find that these amounts are "obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury". *Wells v. Shoemaker*, 64 Nev. 57, 75, 177 P.2d 451, 460 (1947). The same rationale applies to the awards of future damages, which were entirely for pain, suffering, and emotional distress.

That is not to say that the Court believes that these women suffered insignificant consequences. The Court is mindful of the fact that the jury found that Defendant's conduct was the legal cause of Plaintiffs having gotten cancer and that cancer is a terrifying and devastating illness. Further, there is no doubt that the loss, or surgical alteration, of a woman's breast has serious and life-long physical and emotional consequences, as does the possible re-occurrence of cancer, however unlikely it may be. Who would volunteer to suffer these consequences for any sum of money?

Accordingly, the Court finds that Plaintiffs' compensatory damages must be remitted to the amounts shown below:

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[2] The fact that Plaintiffs did not argue, or even suggest, an amount of general damages, left the jury adrift to speculate without guidance as to what might be a proper award.

Mrs. Rowatt:

Past Damages:	$4,557,027.00
Future Damages:	3,000,000.00

Mrs. Forrester:

Past Damages:	4,561,481.00
Future Damages:	3,400,000.00

Mrs. Scofield:

Past Damages:	4,510,401.00
Future Damages:	2,750,000.00

II. PUNITIVE DAMAGES

Punitive damages are designed to punish, to make an example for others who might be inclined to engage in similar conduct and to discourage such conduct in order to protect others from harm. Here, there was substantial evidence from which the jury could conclude that Wyeth knew that its product could cause breast cancer, that it intentionally failed to conduct adequate tests, that it financed and manipulated scientific studies, and sponsored articles in professional and scientific journals that deliberately minimized the risk of cancer while over-promoting certain benefits and citing others which it knew to be unsubstantiated. The evidence also supported the conclusion that Wyeth intentionally made similar misstatements and misleading assertions in its marketing to physicians and its advertising directed to the public.

The jury found that this conduct constituted malice and fraud under Nevada law.[3] The Court is bound by

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[3] The Legislature defined these terms as follows:

that finding. Having concluded that the decision to award punitive damages was proper, the Court must determine whether the amount was "excessive".

In *Bongiori v. Sullivan*, 122 Nev. 556, 138 P.3d 433, 451 (2006), the Nevada Supreme Court wrote:

> "Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case." The focus in on what is fair, just, and reasonable, according to the ordinary meaning of these terms. The relevant considerations are "the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and means which are judged necessary to deter future misconduct of this kind." *Ace Truck v. Kahn*, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (1987).
>
> The Supreme Court continued, saying:
>
> Although states have discretion over the imposition of punitive damages, the Due Process Clause of the

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"Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.

"Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

"Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences. NRS 42.001

> Fourteenth Amendment prohibits grossly excessive or arbitrary punitive damage awards. To protect against grossly excessive or arbitrary awards, the United States Supreme Court has fashioned three guideposts for deciding when a punitive damage award has violated due process. The three considerations are (1) "the degree of reprehensibility of the defendant's conduct," (2) the ratio of the punitive damage award to the "actual harm inflicted on the plaintiff, and (3) how the punitive damages award compares to other civil or criminal penalties "that could be imposed for comparable misconduct." "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."

Id., citations omitted.

The jury could justifiably find a significant degree of reprehensibility in Defendant's decision to misrepresent the risks and benefits of a product which the jury determined caused Plaintiffs' cancers, in order to increase its bottom line. Nonetheless, Wyeth did give a warning, although arguably inadequate and did sponsor some limited testing.

In conclusion of this evidence, the legal standards and the other factors set out above, the Court finds the amount of punitive damages to be excessive. They are reduced to the following sums:

Mrs. Rowatt:	$10,000,000.00
Mrs. Forrester:	$13,000,000.00

Mrs. Scofield: $12,000,000.000[4]

(Defendant's net worth is $14.65 billion)

III. SET-OFF

Wyeth was originally sued along with Upjohn. It was alleged that they were joint-tortfeasors. Upjohn settled with Plaintiffs. The parties stipulated, and the Court ordered, that the settlement was in good faith. See, NRS 17.225, *et seq.* Wyeth claims it is entitled to an off-set against Plaintiffs' awards for the sum paid in settlement by Upjohn.

Plaintiffs assert that Wyeth is not entitled to a set-off because it and Upjohn were intentional tortfeasors. See, NRS 17.255, and *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 609-610, 5 P.3d 1043 (2000). The jury in this case found that Wyeth's conduct was intentional, fraudulent and malicious. The Supreme Court in *Evans* expressly held "as a matter of law, intentional tortfeasors . . . may not apply credit from settlements by their joint tortfeasors in reduction of judgments against them arising from the intentional misconduct. *Id.*, 116 Nev. at 509-610. Therefore, Wyeth's request for set-off is DENIED.

IV. CONCLUSION

The Court finds that the totality of the circumstances indicate that the amounts of the verdicts "suggest" they were the result of passion and prejudice.[5] The Court

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[4] The jury awarded $31,000,000.00, $35,000,000.00 and $33,000,000.00 respectively.

[5] *Harris v. Zee*, 87 Nev. 309, 312, 486 P.2d 490 (1971).

believes that this reduction in damages adequately compensates Plaintiffs for the serious consequences which the jury found to have been caused by Defendant, while also serving to punish Defendant and deter others from similar conduct, as contemplated by the Nevada Legislature. See, NRS 42.005. Accordingly, Plaintiffs' damages are reduced as set out herein.[6] In the event any Plaintiff declines to accept the reduction, Defendant is entitled to a new trial. NRCP 59.

IT IS SO ORDERED.

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[6] Plaintiffs are entitled to costs and interest as provided by law.

APPENDIX C

SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA
FOR THE COUNTY OF WASHOE

No. 04-01699

ARLENE ROWATT, PAMELA FORRESTER AND
JERALDINE SCOFIELD, Plaintiffs,

v.

WYETH, Defendants.

February 6, 2008

PERRY, District Judge.

AMENDED ORDER

Wyeth has filed two post trial motions which will be addressed separately below.[1]

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[1] The Court understands that Defendant may need to preserve these issues for appeal. It notes, however, that almost every issue raised by Defendant has been previously briefed and/or argued and decided against Defendant in orders in limine, during settlement of jury instructions, rulings on evidence or motions. The Court incorporates those rulings herein.

I. MOTION FOR A NEW TRIAL OR OTHER RELIEF

Wyeth claims to be entitled to a New Trial or Other Relief on the following grounds:

A. IMPROPER AWARD OF PUNITIVE DAMAGES DURING PHASE I

As usual in punitive damage cases, the trial was bifurcated into two phases. In Phase I, the jury was to decide liability and the amount of compensatory damages. If in Phase I, the jury made the requisite findings to support punitive damages, a second Phase would need to be conducted to determine the amount of any punitive award.

In this case, it appeared that the jury was confused and awarded punitive damages in Phase I. When this matter was brought to the attention of the Court, an interrogatory was given to the jury. The jury's response revealed that punitive were improperly included in the award.

The jury was then properly instructed and returned to the jury room to redetermine the proper amount of damages in Phase I. The jury deliberated and returned a verdict which did not include punitive damages. Thereafter, the jury heard Phase II and returned a separate verdict which awarded punitive damages.

A review of Nevada common law reveals strong policy considerations in favor of correcting verdict errors or irregularities at the trial court level and prior to the discharge of the jury. *See Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 273, 628 P.2d 681 (1981). The Nevada Supreme Court has consistently held that it is desirable

to correct a defective jury award by returning the verdict to the jury for further consideration, *not* by ordering a new trial. For example, in *Carlson v. Locatelli*, 109 Nev. 257, 263, 849 P.2d 313, 316-17 (1993), the Nevada Supreme Court held, "[w]here possible, the verdict should be salvaged so that no new trial is required." *Citing Amoroso Constr. v. Lazovich & Lazovich*, 107 Nev. 294, 810 P.2d 775 (1991); *see also Brascia*, 105 Nev. at 596 n. 2; *see generally*, *Alex Novack & Sons v. Hoppin*, 77 Nev. 33, 44, 359 P.2d 390, 395 (1961). The Nevada Supreme Court has gone so far as to hold that "where a jury returns an inconsistent verdict, it is 'incumbent' upon the trial court to attempt to clarify the verdict...." *Carlson*, 109 Nev. at 263, *citing Amoroso Constr.*, 107 Nev. at 298.

As indicated above, the Nevada Supreme Court strongly favors the use of a special interrogatory asking the jury to clarify its verdict. ". . . [S]uch an effort to determine what the jury intended by its verdict generally will not impermissibly delve into the mental processes of the jury in reaching the verdict." *Carlson*, 109 Nev. at 263, *citing Amoroso Constr.*, 107 Nev. at 298.

Moreover, the jury's confusion about whether it was to award punitive damages in Phase I was caused, at least in part, by the acts and inaction of the parties. The Court had originally proposed to instruct the jury that the issue of the amount of punitive damages would be submitted to the jury in a second phase if the jury elected to award them in the first phase. Plaintiffs objected to that instruction and Defendant did not oppose Plaintiffs' objection or offer an alternate instruction that would have alleviated the confusion. Had the instruction been given, there would have been no confusion. Where a party's conduct results in an error,

that party cannot cite that error as a basis for relief. In *Pearson v. Pearson*, 110 Nev. 293, 871 P.2d 343 (1994), the Court noted:

> The doctrine of "invited error" embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit. It has been held that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it. In most cases application of the doctrine has been based on affirmative conduct inducing the action complained of, but occasionally a failure to act has been referred to.

Accordingly, the Court finds that Defendant is not entitled to relief.

B. ALLEGED ERRORS REGARDING JURY INSTRUCTIONS

1. INSTRUCTION NO. 22

The Court previously ruled that causation is properly addressed by the "legal cause" instruction, particularly where the parties are arguing multiple possible causation. (See, Nev. Pattern Jury Instruction, comment to 4.04A).

2. INSTRUCTION NO. 43A

Defendant complains that it was entitled to an instruction on life expectancy which took into consideration Mrs. Forrester's shortened life expectancy due to her lung cancer. Defendant forgets that it requested, and obtained, an order in limine excluding

evidence of her lung cancer. Moreover, the instruction given and the mortality table used, includes all persons, including those who are ill, and tells the jury that some people live longer and others live shorter.

3. **INSTRUCTION 38**

This objection involves the "learned intermediary" rule which the Court found not to limit Defendant's duty where Defendant made direct representations to patients and consumers in promotions and advertising.

4. **INSTRUCTION 39**

Where a person deliberately creates a false impression or states a partial truth, a duty to disclose can arise. Here, Defendant made false and exaggerated claims regarding its products. *Villalon v. Bowen*, 70 Nev. 456, 273 P.2d 409 (1954).

5. **INSTRUCTION 40**

The Court believes that "material fact" was properly defined under Nevada law.

6. **INSTRUCTION 20**

The jury was properly informed as to the elements of negligence. The Court does not believe that the elements need to be restated each time the term negligence is used.

7. **INSTRUCTION 21**

In the Court's view, a drug manufacturer is a "person" and vice-versa as defined in the instructions.

8. **INSTRUCTION 28**

Nevada rejects Restatement § 402(k) and therefore the instruction was not given. A manufacturer cannot invoke learned intermediary when it markets directly to consumers, particularly when its ads are misleading.

9. **INSTRUCTION 32**

Case law previously cited by the Court during trial supports the notion that a manufacturer's warning may be undermined by advertising and other materials made available to doctors, patients or consumers which contradicts, confuses, or waters-down the warning.

10. **INSTRUCTION 33**

The Court believes that once Wyeth began to be aware of a causal relationship between its products and breast cancer and was making representations about their safety, the jury could find that there was a duty to test and that it was a breach of that duty not to have done so under general principles of negligence.

11. **INSTRUCTIONS DEFENDANT CLAIMS SHOULD HAVE BEEN GIVEN IN PHASE I**

Defendant complains that an instruction that punitive would be decided in Phase II was not given, Defendant forgets that the Court offered to give this instruction. Plaintiffs objected and Defendant did not argue or assert that it should be given. Neither did Defendant offer such instruction, or object. See, *Pearson v. Pearson*, *supra*.

12. Defendant argues that in determining whether Wyeth is guilty of fraud of malice, the jury may only consider conduct by Wyeth that actually harmed the

plaintiffs in the State of Nevada, and may not consider evidence of marketing or other materials not relied upon by the Plaintiffs or their doctors.

Wyeth initially advocated for language concerning the types of constitutional issues addressed in cases such as *Campbell* and *Phillip Morris*[2] to be included in the Phase II instructions *only*. *See* Tr. pp. 5030-32, 5056-64. The Court agreed to include this type of language in the Phase II instructions only. *Id.* Subsequently, Wyeth provided the Court with a proposed jury instruction to be given during Phase I, which the Court found to be contrary to the law as stated in *Phillip Morris*, *supra*. This was also covered by other instructions. Accordingly, the Court finds that Wyeth's argument is without merit.

13. Defendant's instruction regarding SEER 9 was covered by other instructions. See, 12 above. The jury may consider conduct outside of Nevada to determine other issues such as notice or fraud, but may not award damages therefore.

14. A general warning about breast cancer cannot overcome false and deliberate misrepresentations to the contrary. The proposed instruction is not the law and was covered by other instructions.

15. The reasonable basis instruction is argumentative (the jury may not . . . *if* . . .")

16. Failure to warn can be based on failure to correct false impressions created by such things as misleading advertising. See, *Allison v. Merck*, 110 Nev. 762, 878 P.2d 948 (1994).

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[2] *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)

17. Defendant's open and obvious instruction was covered by other instructions and not a full and accurate statement of the law.

18. Defendant's "state of the art" instruction is not the law in Nevada. See, *Robinson v. GGC, Inc.*, 107 Nev. 135, 141-143, 808 P.2d 526-527 (1991)(compliance with law is admissible, not conclusive).

19. Comment (k) is not the law in Nevada. See, *Allison*, *supra*.

20. Defendant contends that the Court should have instructed that Plaintiffs bear the burden on pre-existing condition. Wyeth failed to cite any legal authority to support this assertion. Moveover, the Court addressed this issue on the record, wherein the Court found that the other instructions regarding burden of proof were sufficient without including Wyeth's language. Wyeth did not object. *See* Tr. Pp. 5051-52.

21. Defendant claims Oregon law controlled. The Court ruled in September of 2006 that Nevada law applied. See, *General Motors Corp. v. District Court*, 122 Nev. 466, 134 P.3d 111 (2006).

22. The reasonable certainty standard does not apply to all medical testimony. *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112 (2002). This issue is also covered by the general instruction on evidence.

INSTRUCTIONS NOT GIVEN IN PHASE II

23. The Instruction on reprehensibility was cumulative and argumentative.

24. See, 23 above.

25. See, 23 above.

26. See, 23 above.

27. See, 23 above.

28. See, 23 above.

29. See, 23 above.

30. See, 23 above.

VERDICT FORM ERRORS

31. Defendant cited no authority that requires an interrogatory relating to medical causation.

32. The Court has ruled that Oregon law does not apply to Mrs. Rowatt. (See, 21 above.)

C. ERRONEOUS ADMISSION OF EVIDENCE

1. EXPERT TESTIMONY

Defendant cites to the admission of the testimony of Dr. Austin, Dr. Blume, Dr. Colditz and Dr. Hallon as error. The Court previously rules this testimony was admissible. The rulings stand.

2. ADMISSION OF IRRELEVANT MISLEADING AND PREJUDICIAL EVIDENCE NOT RELIED UPON BY PLAINTIFFS OR THEIR DOCTORS

The Court has previously ruled on each of these items of evidence and found them to be admissible for such diverse reasons as Defendant's knowledge, state of general scientific knowledge, Defendant's state of mind, impeachment, motive, plan or scheme to deceive. The Court adopts its previous rulings.

3. IRRELEVANT AND INFLAMMATORY EVIDENCE THAT WAS MISLEADING, CONFUSING AND PREJUDICIAL

Each of the nine complaints raised by Defendant was previously made and rejected at trial. The Court adopts its previous rulings.

D. MISCONDUCT BY PLAINTIFFS' COUNSEL

Defendant's allegations regarding Cynthia Pearson being described as an "independent doctor" do not, in the Court's judgment, rise to the level of misconduct and certainly not plain error. See, *Ringle v. Burton*, 120 Nev. 82, 95, 86 P.3d 1032 (2004). The word independent is sufficiently vague as to not impart any significant erroneous meaning. The Court finds that the use of the word "doctor", in light of the testimony about her background, is harmless.

Likewise, Dr. Smith was cross-examined about his prior statements and the jury was well aware of his relationship. The issue of payment is not sufficiently probative in light of all the other evidence in support of Plaintiffs' claims to justify a new trial.

E. IMPROPER COMMENTS BY THE COURT

The Court has reviewed each of the allegedly improper comments and finds them to have been appropriate and/or harmless. Moreover, Defendant cites no legal authority in support of its position.

F. ERRONEOUS EXCLUSION OF RELEVANT AND PROBATIVE EVIDENCE

The Court adopts and incorporates its previous rulings on motions in limine and exclusion of evidence.

G. IMPROPER CONSOLIDATION AND REFUSAL TO SEVER

This issue was extensively briefed and argued. The Court believes that it properly exercised its discretion in favor of judicial economy after having balanced the other considerations. The court reaffirms and incorporates its previous rulings in favor of consolidation. (Without consolidation, these cases would have each taken 3 to 4 weeks).

H. EXCESSIVE DAMAGES AND REMITTUR

The Court believes that *remitter* should be considered. The parties have set a hearing for February 14, 2008. The Court will consider the issue of excessive damages and remitter at that time. The parties should be prepared to address the evidence which is claimed to support the amount of compensatory damages awarded and the factual and legal basis for the amount of punitive damages.

II. DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

As the title of this Motion implies, each of Defendant's arguments has been previously made and rejected by the Court. The Court finds that Defendant raises no new contentions or otherwise persuasive

arguments. The Court adopts and incorporates its previous rulings. Defendant's Motion is DENIED.

III. CONCLUSION

Defendant's Motion for a New Trial and its Motion for Judgment As a Matter of Law are DENIED. The Court reserves ruling on Defendant's request for Remittur of allegedly excessive damages until after the hearing scheduled for February 14, 2008.

MAY 19 2011

No. 10-1177

IN THE

Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS, INC.,
Petitioners,

v.

JERALDINE SCOFIELD, *ET AL.*
Respondents

On Petition For a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Questions Presented, properly related, are:

1. When a trial court's conclusion that the jury's verdicts suggest passion and prejudice is merely a factor in its finding of excessiveness—but does not entail a determination that the jury abandoned its neutrality—and when it is the defendant itself who moves for remittitur on the ground that such relief would cure any such passion and prejudice, does due process nonetheless require the trial court to grant a new trial instead of remittitur?

2. Where the compensatory damages are significant, is the ratio between compensatory and punitive damages the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict, regardless of the facts and circumstances?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Plaintiffs-Respondents Jeraldine Scofield, Wendell Forrester as special administrator of the estate of Pamela Forrester, and Jeffrey Ouelette and Richard Rowatt as special administrators of the estate of Arlene Rowatt respectfully submit this brief in opposition to the petition for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

The Petition's breezy, four-paragraph description of Wyeth's decades-long development, research, and marketing of its hormone therapy drugs omits key facts, making it difficult for the reader to understand how the jury in this case could have found Petitioners [hereinafter "Wyeth"] liable for Respondents' cancers, or that Wyeth engaged in egregious misconduct. Accordingly, Respondents provide a fuller accounting here, drawn largely from the Nevada Supreme Court's balanced summary of the evidence presented at trial. Pet. App. 6a-14a. That evidence confirms that Wyeth intentionally undermined and hid the mounting scientific evidence that its hormone therapy drugs caused breast cancer, refused to follow up on dozens of safety signals with much needed breast cancer studies, did so with a reckless disregard for the health of its consumers, pursued this course of conduct with an objective of significant financial gain, and, as a result, severely injured these three Nevada women.

A. Facts as Described by the Nevada Supreme Court

In 2004, Plaintiffs Jeraldine Scofield, Pamela Forrester, and Arlene Rowatt, residents of Nevada, sued Wyeth after being diagnosed with breast

cancer.[1] These personal injury and strict products liability suits, which were consolidated for trial, alleged that these women developed breast cancer due to their use of Wyeth's combination hormone therapy drug. That drug therapy consisted of estrogen taken together with a synthetic progestin (collectively, "E+P"). E+P is prescribed to relieve menopausal symptoms, such as hot flashes and vaginal atrophy and to prevent osteoporosis. E+P could be taken as either two pills or, after 1995, in a single Wyeth drug called "Prempro."

Wyeth first introduced estrogen (or Premarin) in 1942, before the Food and Drug Administration (FDA) had authority to fully evaluate drug safety and efficacy. Premarin was thus a "grandfathered" drug and did not have to meet current FDA approval standards.

In the mid-1970s, Wyeth's estrogen sales plummeted after it was shown that estrogen use caused endometrial cancer. Wyeth thus started recommending the addition of progestin to curb estrogen's risk of endometrial cancer. Respondents were all prescribed E+P.

Internal corporate documents demonstrate that, by 1976, Wyeth knew that a specific type of breast cancer (hormone dependent cancers) can and does respond to the presence of hormone drugs. All three women developed this type of breast cancer, a cancer that requires hormones to develop and grow.

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[1] After trial, Forrester and Rowatt died of causes unrelated to this litigation. The administrators of their estates were substituted as parties and appear here as respondents, along with Plaintiff-Respondent Scofield.

Rather than conduct studies to prove the safety of using E+P together, Wyeth instead requested FDA approval to sell these two "grandfathered" drugs together to treat menopause. The FDA rejected Wyeth's application and specifically told Wyeth that the company first needed to conduct studies to confirm the combination drug's safety. Over the next fifteen years, Wyeth was put on notice—more than a dozen times—by its own scientists, the FDA, and independent researchers that there were unanswered question about the breast cancer risk of E+P. Wyeth's own scientists opined that the number of E+P studies were "practically non existent." In 1990 and again in 1991, a panel of FDA experts reviewed the worldwide literature and found insufficient data to determine whether E+P increased the breast cancer risk. Wyeth celebrated these findings while failing to budget even a single dollar for breast cancer research. Internal corporate documents reveal that Wyeth was afraid that the results of such an E+P study could be "embarrassing." Wyeth's documents also confirm a corporate policy to not fund breast cancer studies on E+P.

Outside of Wyeth, independent researchers started reporting increased breast cancer risk with E+P. One study, published in the New England Journal of Medicine in 1989, showed a relative risk of 4.4 (a 4-fold increased risk) of breast cancer in E+P users, In response to this scientific data, Wyeth instructed its sales force not to discuss the study with any prescribing physicians. On multiple occasions from 1990 through 2000, when independent researchers expressed concern about E+P's breast cancer risk, rather than publicize those results to the doctors and patients, Wyeth instead

created internal taskforces charged with counteracting these findings, dismissing the results, and downplaying the breast cancer risk of its drugs.

For example, in 1996, a study revealed that E+P particularly increased the risk of breast cancer for thin or lean women. Jeraldine Scofield is a very thin woman. Rather than warn physicians, Wyeth instead created the "Breast Cancer Working Group" which was tasked with keeping the article "confidential" and warned not to discuss the study outside the company. Wyeth also developed a detailed public relations strategy to minimize and divert media attention from the study. More alarming, Wyeth updated its European warning label to describe this accelerated risk for a specific population of users, but never updated the American label.

Wyeth responded to emerging concerns about its drugs with public relation campaigns that provided reassurance of the drugs' safety as well as scathing criticism of each study and its authors. Wyeth took steps to neutralize critics, counter negative publicity with positive press and agreed to fund educational organizations only if they first committed to saying that E+P did not cause breast cancer. Wyeth management approved a $40.4 million marketing budget to counter rising awareness about safety issues with E+P. Wyeth also began to promote these drugs for unproven and unsupported heart and mental health benefits. In television ads, textbooks, and information pamphlets, Wyeth encouraged long-term E+P use for illusory cardiac and cognitive protection benefits that were later proven false. The FDA repeatedly admonished Wyeth for its promotion

of unapproved benefits, but the company continued its marketing efforts anyway.

Wyeth also "ghost-wrote" dozens and dozens of published medical articles that downplayed the risk of breast cancer and promoted unproven heart and brain benefits of these drugs. Even though the idea for the articles was Wyeth's and Wyeth hired non-physician technical writers to actually write them, Wyeth's role in the creation of these articles was not revealed. The published papers appeared to be authored by independent physicians.

Despite the lack of safety studies, and in the face of emerging science showing significant safety issues with E+P, Wyeth recommended E+P use for "all women for life" in their promotional materials.

In 1994, the FDA granted Wyeth conditional approval of a single E+P pill (Prempro). This conditional approval required Wyeth to conduct a "comprehensive investigation" of the breast cancer risk. Despite that requirement, Wyeth never conducted a breast cancer study.

In 2002, the world uncovered the truth about hormone therapy. The National Institutes of Health conducted a large, long-term study to assess the benefits and risks of E+P. This study, the Women's Health Initiative (WHI), was prematurely halted in 2002 due to an increase in invasive breast cancer in the E+P users. The breast cancer results crossed the study's pre-determined safety index, and the NIH had to stop the study prematurely to protect the volunteers. The WHI study also showed no heart or brain benefit, but rather an increase in cardiac events and clinically meaningful cognitive decline.

After this data was made public, prescriptions for E+P fell dramatically, by as much as 80 percent. The number of hormone dependent breast cancers in this country also fell for the first time. Respondents' expert epidemiologist testified, based upon published epidemiological studies, that E+P caused approximately 8,000 to 15,000 additional breast cancers each year. This statistic was appropriately introduced as evidence of general causation as well as of Wyeth's reprehensibility under this Court's guidance in *Phillip Morris USA, Inc. v. Williams*, 549 U.S. 346, 355 (2007).

After the WHI, Wyeth brought a new drug to market called Low Dose Prempro. This new drug has significantly less E and P, is recommended only for short duration use, and is a second-line treatment. Today, these drugs carry a black-box warning, the strongest FDA warning possible, which confirms that use of E+P increases the risk of invasive breast cancer and that the risk increases with each year of use.

Respondents Rowatt, Scofield, and Forrester all ingested E+P long-term: Rowatt for more than seven years; Forrester for nine; and Scofield for fifteen.

Each testified at trial about the horrific effect of breast cancer on their lives, and their families'. This included testimony about the women's various surgeries, substantial resulting disfigurement, and post-surgical treatments, including chemotherapy and radiation. Each testified that they would not have taken the medication had they known of the risk of breast cancer. Their health care providers also testified that, when they prescribed Wyeth's

hormone therapy drugs to Respondents, they thought the benefits outweighed the risks and that there was no real risk of breast cancer from the drug. The physician's opinions and prescribing practices changed dramatically after the results of the WHI study were publicized.

The jury originally returned verdicts in Respondents' favor totaling $134.6 million in compensatory damages. Because the jury also found that Wyeth acted with malice or fraud, the district court informed the jury that it would return for a second phase on punitive damages. The district court later learned, before the start of the second phase, that the initial verdict mistakenly already included punitive damages. The district court thus proposed to reinstruct the jury and direct it to deliberate anew only as to compensatory damages. Wyeth originally agreed to this procedure, then changed its mind and requested a mistrial. The trial court denied Wyeth's motion and, following a second round of deliberations, the jury returned compensatory verdicts in Respondents' favor totaling $35.1 million.

At the conclusion of the second punitive phase, the jury returned additional verdicts in Respondents' favor totaling $99 million. Wyeth moved for a judgment as a matter of law, a new trial, or remittitur. Wyeth's motion for remittitur invited the district court to remit the awards because they were, in Wyeth's view, excessive and the product of "passion and/or prejudice." The district court denied the first two requests, but granted Wyeth's remittitur motion. The court reduced the total compensatory damages for the three plaintiffs to $23

million[2] and the punitive damages to $57,778,909. It found that, as a matter of Nevada law, remittitur was appropriate because the compensatory and punitive damages awards were excessive suggesting passion and prejudice. Respondents accepted the remitted awards.

Petitioners appealed to the Nevada Supreme Court. In a unanimous decision, the court "perceive[d] no reversible errors in the issues raised on appeal" and thus affirmed the district court's judgment.

B. Facts Misstated by Wyeth in Its Petition

In a bid to make its Petition more compelling and to undermine the decision below, Wyeth repeatedly characterizes the determinations of the Nevada district court and supreme court as having concluded that the jury was inflamed by passion and prejudice *as a result of* improper conduct on the part of Respondents' counsel at trial. *See, e.g.*, Pet. 2-3, 8 & 16. The courts below made no such finding. Both the trial court and supreme court found no attorney misconduct justifying reversal. Instead, the trial court, as a matter of state law, determined that the jury's verdicts were excessive and stated that the amounts awarded "suggest[ed]" passion and

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[2] Wyeth incorrectly asserts that the compensatory damages awards in this case are greatly in excess of all other hormone therapy verdicts to date. Recently, a Pennsylvania jury returned a compensatory verdict of $6.3 million for a single plaintiff, a number right in line with the remitted awards here for three plaintiffs. *Kendall v. Wyeth*, No. 040600965 (Pa. Ct. Common Pleas Nov. 21, 2009).

prejudice. Pet. App 51a. The Supreme Court merely accepted the trial court's ruling on this issue. As explained *infra*, pp. 20-22, this category of suggested passion or prejudice stands on a very different legal plane than that which is engendered by attorney misconduct. Indeed, under Nevada law, passion and prejudice is a term of art used to describe one factor of excessiveness.

In contrast to Wyeth's assertions, *see* Pet. 3, the FDA did not approve of Wyeth's conduct in this case, and Prempro is not approved and still prescribed as it was when taken by Respondents. Indeed, the FDA repeatedly admonished Wyeth for its inappropriate marketing and consistently warned Wyeth that studies were needed to answer outstanding safety issues with E+P. Wyeth steadfastly ignored the FDA. Indeed, Wyeth actively downplayed the risks of E+P while exaggerating the unproven benefits, a course of conduct the Nevada Supreme Court described as "fraught with reprehension and deception." Pet. App. 28a. Today the FDA requires strong, definitive warnings about the breast cancer risk in a black box warning. And new Low Dose Prempro is used only short term for second line treatment.

REASONS FOR DENYING THE PETITION

The Petition fails to satisfy any of the traditional bases for this Court's review. *See* Sup Ct. R. 10. The Petition provides a woefully incomplete account of both the material procedural history of this case and the record evidence. Contrary to the tale Wyeth spins, the record—and the unanimous opinion of the Nevada Supreme Court—tells the story of a company that resisted obligations imposed

by the FDA, that undertook extensive campaigns to provide false reassurance that its drugs were safe while unlawfully promoting off-label uses, and that received the relief it specifically sought from the trial court, a remittitur. It is a record that provides no basis to review the questions Wyeth seeks to present.

By representing to the courts below that a remittitur, if granted, would provide sufficient relief, Wyeth is ill-positioned to now argue that this relief violated Wyeth's constitutional rights. Wyeth's Petition, in essence, asks this Court to find that a court violates a party's Due Process rights when the party receives the relief it successfully requested.

Moreover, Wyeth's question on the need for a new trial rather than remittitur fails to present an important federal question on which the lower courts are in conflict, or about which they may be fairly said to be confused. That lack of conflict is true with regards to both questions presented. whether remittitur violated due process and whether the punitive damages must be reduced from 1.5:1 to 1:1. Thus, the petition should be denied.

I. THE FIRST QUESTION IS NOT PROPERLY BEFORE THE COURT

A. Wyeth Requested, and Received, the Very Relief It Now Insists Is Constitutionally Deficient

Post-trial, Wyeth sought relief from the jury's entire verdict by moving for a new trial or, alternatively, for a remittitur. The trial court granted Wyeth's request for a substantial remittitur, albeit not to the extent requested by Wyeth. Now,

Wyeth asks this Court to relieve it from the relief it sought and received.

This Court should deny the Petition and adhere to its longstanding practice of declining to review invited errors that were not raised and passed upon below.[3] *See Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987) (per curiam), *Minneapolis & St. L. R. Co. v. Winters*, 242 U.S. 353, 355, 356 (1917) (Holmes, J.) (holding that any error in basing personal injury recovery upon a federal statute cannot be urged where defendant "invoked and relied upon that statute" because a party "cannot complain of a course to which it assented below."); *McGillin v. Bennett*, 132 U.S. 445, 452-53 (1889) (holding that a party cannot predicate error on the admission of evidence he himself introduced).

In *Springfield*, for example, the petitioner did not object at trial to a jury instruction stating that proof of gross negligence would suffice to establish a municipality's liability under federal law. 480 U.S. at 259. In fact, the petitioner proposed its own instruction to the same effect. *Id.* Later, before this Court, petitioner for the first time argued for a higher standard than gross negligence. The Court dismissed the writ as improvidently granted, relying upon the "considerable prudential objection to reversing a judgment because of an instruction that petitioner accepted, and indeed itself requested." *Id.* That same prudential objection strongly militates

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[3] This discussion assumes only for purposes of argument that there was error. For the reasons discussed below, however, there was no error because remittitur was constitutionally acceptable relief under these circumstances

against this Court's review of Wyeth's first question, because it would require the Court to reverse a judgment based on relief that Wyeth appropriately requested *and received*.

Before this Court, Wyeth argues that, as a matter of due process, a new trial is the "only" constitutionally acceptable remedy when a verdict may be the product of a jury's passion or prejudice. Pet. 18. According to Wyeth's new view, remittitur is never a constitutionally appropriate remedy where, as here,[4] the verdict may be a product of passion and prejudice and may have affected the jury's decision on liability. Pet. 3, 15-16.

But in the trial court, Wyeth specifically requested that the court remit the award for compensatory and punitive damages if it did not order a new trial. App. 2a (Wyeth's motion requesting remittance of the punitive and future compensatory damages to zero and past compensatory damages to a "fair" and "reasonable" amount). Remittitur *was* appropriate, Wyeth told the trial court, *because* the award was "excessive" and "clearly the result of passion and/or prejudice." App. 2a. That is the converse of Wyeth's current argument—that remittitur *was not* appropriate

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[4] Respondents dispute that the verdict was infected with "passion and prejudice" in a due-process sense. However, as explained at the tail-end of section I.B (pp. 17-18) and in section III.A, the term passion and prejudice in some jurisdictions, including Nevada, "does not entail a determination that the jury has abandoned its neutrality; it is merely a finding of excessiveness." PLAC Amicus Br. Supp. Pet 11.

because the award was the result of passion and prejudice. Pet. 15-16.

The analysis does not change merely because Wyeth sought remittitur as alternative relief to a new trial. It never argued that only a new trial could cure a verdict affected by passion and prejudice. Wyeth requested remittitur in the alternative on the basis of the reasoning Wyeth now opposes, that remittitur is sufficient to cure an excessive verdict considered evidence of passion or prejudice. After asserting that relief to be sufficient before the trial court, reaching the first question presented here would appear to "excuse inattention or reward cunning." *United States v. Wells*, 519 U.S. 482, 489 (1997).

B. The Courts Below Never Addressed Petitioners' Novel Due Process Argument

The prudential objection assumes added force here because the Nevada courts never addressed Wyeth's novel due-process argument and were deprived of a fair opportunity to do so. *See Wells*, 519 U.S. at 489 (recognizing that the Court may, in its discretion, review invited error if it was pressed or passed on in the courts below). Review of the first question presented therefore would be inappropriate.[5]

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[5] This is the case even if the requirement that a federal claim be addressed or properly presented in state court is prudential rather than jurisdictional. *See Adams*, 520 U.S. at 90.

With few exceptions, this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). *Adams* makes clear that when the highest state court is silent on petitioner's federal claim, this Court assumes that the issue was not properly presented, *id.*, unless Petitioner "demonstrat[es] that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Id.* at 87 (citing *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

The Nevada Supreme Court in this case did not squarely address Wyeth's novel due process argument and this Court should thus assume that the issue was not properly presented. What is more, Wyeth cannot defeat this assumption because, as a careful review of the briefing in the lower courts confirms, the courts below did not have a fair opportunity to address the specific due-process question that Wyeth now presents.

The Nevada Supreme Court never discussed whether, as a matter of due process, the "only" constitutionally acceptable remedy when a verdict has been tainted by a jury's passion or prejudice is a new trial. *See* Pet. App. 39a-44a. Although Wyeth attempts to locate its due-process argument in the court's discussion of whether "the jury improperly deliberated and awarded punitive damages without receiving proper instructions," thereby violating Petitioners' "purported procedural due process"

rights, Pet. App. 41a, the issue cannot fairly be said to be situated there.

After concluding that the district court had properly bifurcated proceedings and instructed the jury on liability and compensatory and punitive damages, the Nevada Supreme Court discussed whether remittitur cured the jury's premature deliberations on *punitive damages*. *See id.* at 41a, 43a. Petitioners' current constitutional objection to remittitur, by contrast, is different in kind—that remittitur is constitutionally defective in any case where there is a finding of passion and prejudice because it does not address a jury's findings on *liability*. Pet. 15. At no point in its decision, did the Nevada Supreme Court consider whether passion and prejudice also tainted the jury's findings on liability, and whether remittitur would be constitutionally inappropriate in that circumstance, confirming that the issue was never properly presented to that court.

Furthermore, the court discussed only whether, *as a matter of state law*,[6] remittitur cured excessive compensatory and punitive damages.[7] Pet.

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[6] The Court did also, however, review the punitive damage award for gross excessiveness under the standard established in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), an issue relevant only to the second Question Presented. Pet App 39a-41a.

[7] Though Wyeth repeatedly trumpets that both courts below agreed that the jury's verdicts were the product of passion and prejudice due to an inflaming closing argument, neither court so concluded. Instead, by virtue of the size of the verdicts, the trial court found that the verdicts "suggest" passion and prejudice. Pet App. 51a When the trial court used

App. 3a, 33a, 43a. The court's standard of review makes that plain. The court reviewed the district court's decision to grant remittitur on the basis of an abuse of discretion standard. Pet. App. 43a (citing *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032, 1037-38 (Nev. 2008)). That standard of review only applies to a suggestion of "passion and prejudice" in a state-law sense *See id.*; *see also Canterino v. The Mirage Casino-Hotel*, 16 P.3d 415, 417 (Nev. 2001). It does not apply where constitutional rights are at stake; because the proper standard then is *de novo* review. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P 3d 878, 879 (2007) ("This court applies a de novo standard of review to constitutional challenges."). The court's use of abuse-of-discretion review thus confirms that the Nevada Supreme Court did not consider the district court's remittitur to implicate constitutional rights.

Because the issue was never properly presented below, the Nevada courts never had a fair opportunity to address Wyeth's new due-process question. Certainly the district court had no such fair opportunity because Wyeth moved that court to *remit* the awards because of the jury's passion and prejudice. Consequently, it had no reason to even consider whether remittitur was constitutionally *inappropriate* in this circumstance.

Neither did the Nevada Supreme Court have a fair opportunity to consider this constitutional question. As a prudential matter, the Nevada court

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the phrase "passion and prejudice," it cited only to Nevada law. *See* Trial Court Order at 6 (citing *Harris v. Zee*, 486 P.2d 490 (1971)). The Nevada Supreme Court accepted the trial court's ruling. Pet. App. 43a

only considers issues raised in the trial court. *See Diamond Enters., Inc. v. Lau*, 951 P.2d 73, 74 (Nev. 1997). Accordingly, it could not have considered the objection Wyeth now presents to this Court.

Given Wyeth's failure to present, let alone preserve, the issue in the district court, the Nevada Supreme Court's silence on Wyeth's new federal due process claim is understandable. Further demonstrating the utter absence of this issue before the Nevada Supreme Court, an examination of Wyeth's briefing there reveals confusing and contradictory arguments that would lead a court to eschew the issue entirely. Although Wyeth, for the first time, argued in their briefing to the Nevada Supreme Court that a new trial was the only constitutionally acceptable remedy, Wyeth nevertheless also asked the Nevada Supreme Court to remit the awards further. Critically, Wyeth's request for remittitur implicitly, if not explicitly, suggested that remittitur *could* blanch the stain of passion and prejudice from the verdict *if* the remittance was sufficiently severe. In its opening brief, Wyeth stated, in a section entitled "The Remitted Awards Remain Excessive": "But even as remitted [by the district court], the awards *remain* grossly disproportionate to the injuries proven and preserve the taint of the jury's passion and prejudice." App. 4a (emphasis added). Wyeth's requested solution? Order a new trial *or* an additional remittitur of "each Plaintiff's compensatory award [remitted] to no more than $1 to 2 million each." App. 5a.

* * *

It bears emphasis that strict adherence to the regular practice of refusing to review invited errors

or federal issues that lower state courts did not address and were deprived of a fair opportunity to address is especially warranted here. Moreover, comity requires it. As in *Adams*, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1997)—and indeed on a ground that Petitioners invited.

So, too, do practical considerations. Petitioners' failure to raise the issue in the trial court at all, and to raise it in a clear and non-contradictory manner in the Nevada Supreme Court, deprived the lower courts of an opportunity to create an adequate factual and legal record to assist this Court, should it choose to hear this issue. *See id.* at 90-91.

Had Petitioners properly presented their constitutional objection to remittitur, the high court would have engaged in *de novo* review, applicable when constitutional rights are at stake. *See supra* at 15. *De novo* review would have required the Nevada Supreme Court to distinguish between passion and prejudice in a state-law sense and in a constitutional sense. *Cf. Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 450 (2001) (Ginsburg, dissenting). The court, however, made no such finding. As a result, Wyeth is asking this Court to review *de novo* a different issue than the one that the Nevada Supreme Court reviewed for an abuse of discretion. That imbalance creates obvious practical difficulties, including the problem that this Court of final review would be the first appellate court to

engage in plenary review of Petitioners' novel due process rule.

Permitting a party, after both trial and appeal, to raise issues not fairly presented below after it has exhausted appeals in a State's court system undermines the orderly administration of justice, as well as fundamental precepts of fairness.

II. THERE IS NO CONFLICT CONCERNING THE QUESTION PRESENTED BECAUSE NO COURT HAS ADOPTED WYETH'S DUE PROCESS THEORY

Wyeth fails to identify a single decision holding that due process *requires* a new trial and *disallows* remittitur when a verdict is tainted by passion and prejudice. Instead, it attempts to extrapolate such a principle from cases that discuss nothing of the sort.

Wyeth relies heavily on *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Moquin*, 283 U.S. 520 (1931), *see* Pet. 11-12, 15, which is not a due process case. In *Moquin*, the Court considered whether a state trial court erred in failing "to grant a new trial in a case under the Federal Employers' Liability Act (45 USCA §§ 51-59) where the verdict was obtained by appeals to passion and prejudice." *Id.* at 521. The Court concluded that "[i]n actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Id.* Thus, this Court's holding was limited to a particular federal statute being litigated in state court and a form of passion and prejudice engendered by the misconduct

of counsel.[8] The decision expressly noted that the federal common law rule it was announcing had no bearing on Minnesota procedures. *Id.* ("Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order [remittitur] as was awarded is immaterial.").

Lower federal court decisions cited by Wyeth also do not support its claim that there is a split on whether due process requires a new trial rather than remittitur under these circumstances. *See* Pet. 12. In some of the cited cases, state law simply required the application of such a rule, though not as a matter of due process. *See Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (applying Kansas law). In others, the reference to such a rule was *dictum* because the courts found no passion or prejudice. *E.g.*, *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 125 (1st Cir. 1991); *Earl v. Bouchard Transp. Co., Inc.*, 917 F.2d 1320, 1327 (2d Cir. 1990).

Similarly, the state court decisions Wyeth cites either adopt or reject a standard on when a new trial is warranted as a matter of state law, not federal due process. *See* Pet. 13 (collecting cases); *see also Kugling v. Williamson*, 42 N.W.2d 534, 539 & n.6 (Minn. 1950) ("Remittitur may not be applied in state courts where actions are based on federal *statutes*" (emphasis added)); *Wollersheim v. Church*

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[8] PLAC, in its amicus brief (at 4), traces this "principle" back to *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889), but, as PLAC itself concedes (at 5), the Court's discussion of what the proper course might have been had the jury in that case been influenced by passion and prejudice is *dicta*. *See* 130 U.S. at 75.

of Scientology, 6 Cal Rptr. 2d 532, 546 (Ct App. 1992) ("[T]here is no merit to Scientology's claim *Moquin* supersedes the many California Supreme Court and Court of Appeal cases which have reduced punitive damage awards rather than setting them aside after finding those awards were excessive and thus "presumed to be the product of passion and prejudice." (citation omitted)).

III. THIS IS NOT A PROPER VEHICLE FOR ADDRESSING WHAT IS OTHERWISE AN UNIMPORTANT ISSUE

A. The Courts Below Never Found that the Jury Abandoned Its Neutrality But Instead Concluded that There Was "Substantial Evidence" to Support the Verdicts

There is no finding by the lower courts that passion and prejudice infected the jury's findings on liability, or that the jury ever abandoned its neutrality. Wyeth's due-process argument depends on such a finding, and in its absence the due-process question is not duly presented.

In this case, the district court reviewed the jury's verdict based upon specific state law factors, found that the awards were excessive as a matter of state law and thus were presumed to be the product of passion and prejudice. *See* Pet. App. 45a (Trial Court Order at 6) (stating that the awards "suggest" passion and prejudice). This use of the term passion and prejudice, as PLAC observes in its amicus brief, "does not entail a determination that the jury has abandoned its neutrality; it is merely a finding of excessiveness." PLAC Br. 11. Although PLAC

assumes that this type of passion and prejudice does not apply to this case (*see* PLAC Br 2), it cites a federal district court decision applying Nevada law as an example of courts that "label any award they deem to warrant reduction as being the product of passion and prejudice—without regard to whether they have concluded that the jury actually departed from its required neutrality." PLAC Br. 10 (citing *Matlock v. Greyhound Lines, Inc.*, 2010 WL 3171262, at *1-*2 (D. Nev. 2010)).

PLAC is half-right: Nevada *is* a jurisdiction in which a determination of excessiveness suggests passion and prejudice but does not entail a finding that the jury abandoned its role as a neutral fact-finder. *See Matlock*, 2010 WL 3171262, at *1-*2. Contrary to Wyeth's and PLAC's submission, however, this *was* the sense in which the district court in this case used the phrase. Notably, *Matlock* cited *Harris v. Zee*, 486 P.2d 490 (1971), as authority for its understanding of the phrase "passion and prejudice" under Nevada law. 2010 WL 3171262, at *1. So too did the district court in this case cite *Harris* when it found that the verdicts "suggest" passion and prejudice. App. 7a & n.5 (Trial Court Order at 6). Clearly, then, the district court's finding that the verdicts in this case suggested passion and prejudice referred to excessiveness but did not entail a finding that passion and prejudice infected the jury's determination on liability or that the jury had abandoned its role as a neutral fact-finder.[9] In the

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[9] Wyeth offers contradictory accounts of the district court's findings. At one point, it tells this Court that the district court "seemingly assumed that the passion and prejudice had not tainted the jury's decision on liability." Pet 16 (emphasis removed). At another, it says that this is an excellent vehicle

absence of such a finding, this is not a proper vehicle for addressing Wyeth's due process question.

There is no fair basis to presume that passion and prejudice infected liability. The courts below both found "substantial evidence" to support the jury's findings on liability, damages and Wyeth's malice. Pet. App. 37a-39a; *see also id.* at 33a (finding "substantial evidence" of actual past and future damages). The lower courts did not believe, and there is no record support for the view, that the jury's decision on liability was without support in evidence or infected by passion and prejudice. Rather, the lower court's decisions prove the exact opposite.

B. State Courts Already Provide All the Process Defendants Are Constitutionally Due

Consideration by this Court is unnecessary because state courts already provide defendants with ample opportunity to contest compensatory and punitive damages liability and to contest the reasonableness of a damages judgment. Wyeth had that opportunity here; they were permitted to, and did, move for both a new trial and remittitur. That procedure was fairly applied below.

There is also significant reason to doubt the correctness of Wyeth's understanding of due process. No court has ever held that the substantive (or procedural) guarantees of due process require a new

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because there is "no doubt" that passion and prejudice infected all of the jury's decisions as the "trial court so found." *See* Pet. 17.

trial whenever there is any indication of passion and prejudice. Nor has any court ever held that, as a matter of due process, remittitur can never blanch a stain of passion and prejudice from a verdict, however visible that stain may be.

One approach this Court has taken to determining whether a particular practice accords with due process is to determine whether the practice was followed in 1868, which marks the "crucial time" for making that assessment as it is the year of the Fourteenth Amendment's ratification. *See Burnham v. Sup. Ct. of Calif.*, 495 U.S. 604, 611 (1990).

Remittitur as a remedy for excessive damages dates back to the English common law. *See Breadmore v. Carrington*, 95 Eng. Rep. 790 (K.B. 1764). As employed here, remittitur came into vogue as an alternative to a new trial, utilized to avoid the cost and delay that a new trial would entail. Justice Joseph Story is credited with introducing remittitur into American law in *Blunt v. Little*, 3 F. Cas. 760 (C.C.D Mass. 1822) (No. 1,578). There, as here, the defendant asserted that the jury's damages were excessive and thus merited a new trial. Justice Story wrote, "if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case." *Id.* at 761-62. Still, he added, "it is reasonable, that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere farther." *Id.* at 762.

American law has remained the same since *Blunt*. Consequently, no long history supports supplanting the option of remittitur with a rigid requirement of a new trial whenever supposed passion and prejudice can be assumed from an excessive verdict, and '[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it.'" *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308 (2009) (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993).

Were Wyeth's understanding of due process the law, every denial of a motion for new trial—motions that mechanically allege some measure of "passion and prejudice"—would join a claim of constitutional error reviewable to this Court from a state high court. The rule's sweep, moreover, cannot easily be contained, "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Determining "constitutionally proper" levels of passion and prejudice (by distinguishing between that which demonstrates the jury abandoned neutrality and that which does not) has never been this Court's role, and should not be. *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting).

IV. THERE IS NO LEGAL CONFLICT TO RESOLVE OVER THE PROPER RATIO BETWEEN SUBSTANTIAL COMPENSATORY AWARDS AND PUNITIVE DAMAGES

Wyeth claims that "lower courts are struggling" over whether "1:1 is a strict limit" on

punitive damages when the compensatory damages awarded are "substantial." Pet. 30. To assert that novel proposition, Wyeth avers that this Court established a rigid 1:1 ratio ceiling as a constitutional maximum, Pet. at 19, relying on language in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) and treating *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501, 514 (2008), as confirming that ratio as a "constitutional upper limit." Pet. 30. Neither decision establishes that doctrinaire approach to cases such as this one.

In advancing its unjustified claim of a strict constitutional 1:1 maximum, Wyeth manufactures a mathematical bright-line straitjacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together. *See State Farm*, 538 U.S. at 424-25 ("[w]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright line ratio which a punitive damages award cannot exceed.") (emphasis added; citations omitted). *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.").

In fact, the same paragraph in *State Farm* that suggests a 1:1 ratio is "perhaps" appropriate when the compensatory award is "substantial" reiterates that "there are no rigid benchmarks that a

punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

Exxon Shipping did not change this constitutional construct. There, this Court recognized that particularly reprehensible misconduct warrants a larger punitive damage judgment. While this Court characterized Exxon's misconduct as mere "recklessness," 554 U.S. at 510 n.23, it also found that cases involving "exceptional blameworthiness," properly reside higher on the "punishable spectrum" and thus merit larger awards. *Id.* at 513.

This Court also took pains to emphasize in *Exxon Shipping* that it was not engaged in a due-process review of the punitive award, but instead its decision was an "exercise of federal maritime common law authority." 554 U.S. at 502. This Court further acknowledged that the exercise of that authority permits "more rigorous standards than the constitutional limit" on permissible punitive damage awards. *Id.* at 506. Because this case does not involve maritime law, *Exxon Shipping's* use of a 1:1 ratio has no application here.

Rather than set out some artificial ratio as the defining limit on punitive damages, the one constant in this Court's jurisprudence is an insistence that an appropriate punitive damage award reflect "'the enormity of the offense.'" *BMW*, 517 U.S. at 575 (1996) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)). It is *that* proportionality principle that is "'deeply rooted" in our jurisprudence. *Id.* at 575 n.24 (citation omitted). Thus, this Court has

emphasized that the "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *State Farm*, 538 U.S. at 419 (citation omitted). Examining a punitive damage award for gross excessiveness is a process of judicial review, not an exercise in elementary-school mathematics.

Here, as the Nevada Supreme Court established, the misconduct was not merely economic, but physical and potentially lethal. Wyeth's misconduct evinced an indifference to or a reckless disregard of the health or safety of others. It was intentional and not mere accident. And, it involved repeated actions on the company's part, as part of a concerted campaign over more than two decades to maintain its financial success. *See, e.g.*, Pet. App. 37a-39a. Thus, it involved many of the aggravating factors this Court recognizes as meriting larger punitive damages. *See State Farm*, 538 U.S. at 419.

Wyeth also calls this case "an ideal vehicle in which to address the question" of whether the Due Process Clause imposes a strict 1:1 ratio limit. Pet. 30. Even if this Court were inclined to disabuse the lower courts of the idea that a mandatory 1:1 ratio exists regardless of the egregiousness of the misconduct, which, of course, is not Wyeth's objective, this is a particularly inappropriate case for that exercise of this Court's discretion on this issue. First, the ratio between punitive and compensatory

damages in this matter is 1.56:1, hardly a difference sufficient to warrant this Court's consideration.[10]

Second, granting review in this case would encourage every defendant against whom punitive damages are awarded to treat as *de rigueur* a petition for certiorari whenever punitive damages do not strictly conform to their preferred ratio limit.

Finally, because Wyeth premises its claim of conflict on different absolute figures used by courts to determine what constitutes a "substantial" compensatory damage figure, Pet. 19, they seek an absurd determination by this Court of an absolute dollar threshold that would trigger the imposition of a strict 1:1 ratio, in essence a plea for the very bright-line rule that this Court has repeatedly and properly eschewed. The vast majority of courts have wisely not focused on dollar amounts *per se*, but instead have faithfully employed this Court's instruction that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

This is true of the courts Wyeth cites to establish a supposed conflict. Thus, instead of adhering to a 1:1 ratio as a strict limit, the Eighth Circuit adopted a 1:1 ratio in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004), cited at Pet. 20, because it found that "$600,000 to compensate [plaintiff] for his harassment . . . is a lot of money." Thus, the substantiality of the

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[10] It is also well within the 3:1 ratio set by Nevada law. Pet. App. 40a (citing NRS 42.005(1)(a)).

compensatory damages was a function of its size relative to the injury to the plaintiff and the misconduct committed. Similarly, in the First Circuit, a 1.1 ratio was deemed a limit where the misconduct was reprehensible but not "particularly egregious" and the $35,000 compensatory damages judgment "amply compensate[d plaintiff] for the mental distress resulting from his confrontation with the Mayor." *Mendez-Matos v. Guaynabo*, 557 F.3d 36, 54, 55 (1st Cir. 2009), cited at Pet 20.

The Sixth Circuit also has employed that type of contextual analysis. Thus, *Bridgeport Music, Inc. v. Justin Combs Publ'n*, 507 F.3d 470 (6th Cir. 2007), held that a compensatory damages award of $366,939, which contained a substantial punitive element, combined with a low level of reprehensibility, could not sustain a $3.5 million punitive damage award, and remanded the punitive damages for "a ratio of closer to 1.1 or 2.1." *Id* at 490. Petitioner holds up another Sixth Circuit case, *Bach v. First Union Nat'l Bank*, 486 F.3d 150 (6th Cir. 2007), *see* Pet. 19-20, in support of its argument for slavish adherence to the 1:1 ratio it favors, even though the subsequent decision in *Bridgeport Music* held 2.1 would satisfy due process under that set of facts. Still, the *Bach* Court makes plain that its application of a 1:1 limit was not a general rule. It instead announced that it would "be wary of any attempt to graft our ruling here onto another set of facts." *Id.* at 156 Thus, like all courts considering the question of the due process limit on any punitive damage award, the *Bach* Court declared that "[a]scertaining the constitutionally correct amount of punitive damages in a given case is a highly fact-intensive exercise, and the facts before us drive our conclusion in this case." *Id.*

The lower courts, including those Wyeth wrongly claims follow a strict 1:1 limit, understand their obligation to examine the specific facts and circumstances and carry out that task without the confusion imagined by Petitioners. *See, e.g., Jurinko v. Med. Protective Co.*, 305 Fed. Appx. 13, 28 (3d Cir. 2008) (finding mere economic harm and not particularly egregious misconduct to justify a 1:1 ratio), cited at Pet. 20-21; *Roby v. McKesson Corp.*, 219 P.3d 749, 769 (Cal. 2009) (finding misconduct "at the low end of the range of wrongdoing" and supporting only a 1:1 ratio), cited at Pet. 21.

In contrast, these three women were grieviously injured and disfigured as a result of Wyeth's multi-decade egregious misconduct in creating an unjustified confidence in the safety of its drug. The facts of their cases were reviewed in depth by the lower courts in concluding the punitive damages were not excessive. There are no grounds that warrant review by this Court.

V. THERE IS NO DIVISION OF AUTHORITY REGARDING WHETHER THE DUE PROCESS CLAUSE BARS AN AWARD OF PUNITIVE DAMAGES WHERE A MANUFACTURER HAS COMPLIED WITH MINIMUM FEDERAL STANDARDS

The Due Process Clause imposes substantive limits on the broad discretion that States possess with respect to the imposition of punitive damages. *Cooper Industries*, 532 U.S. at 433. These limits, however, have never precluded a determination of reprehensibility based solely on regulatory compliance, as Wyeth suggests. Pet. 27. Case law establishes that regulatory compliance does not bar

the imposition of punitive damages where the regulatory standards lack preemptive effect. Moreover, here, there was substantial evidence that the FDA repeatedly admonished Wyeth for its marketing conduct and requested additional studies for over two decades, studies Wyeth refused to conduct. *See* 3, 9 *supra*.

In fact, Wyeth's theory that compliance should "constitute compelling evidence" against punitive damages, Pet. 27, was addressed in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). There, this Court held that a federal statute did not preclude Oklahoma from awarding punitive damages in a case in which the alleged tortfeasors had substantially complied with a federal regulatory scheme. *Id.* at 258. It then remanded the case for consideration of whether substantial compliance with a regulatory scheme bars the award of punitive damages as a *matter of Oklahoma law*, and whether "the amount of the punitive damages award was excessive." *Id.*; *see* 769 F.2d 1451, 1457 (10th Cir. 1985) (deciding, on remand, that Oklahoma law does not categorically bar punitive damages based on substantial compliance). Nevada has already answered that question by upholding the punitive award here.

States undoubtedly have the authority to determine what value to accord a manufacturer's compliance with federal regulations in products liability actions. *See* American Law Institute, Restatement (Third) of Torts: Prods. Liab. § 4 (1998). *See also, e.g., Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 988 (Ind. 2006) (recognizing state authority "to place some particular value upon compliance with federal safety standards"). Indeed, this Court has repeatedly recognized that "where state law provides

the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). After all, a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572.

The laws of several states treat compliance with federal regulations or industry custom as rebuttable evidence that a manufacturer was not recklessly indifferent to potential harm, but nevertheless allow punitive verdicts if defendant's knowledge of the potential harm establishes reckless conduct that warrants punitive damages. *See, e.g.*, *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1446 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (Kansas law) ("[C]ompliance with the FDA regulations does not preclude punitive damages when there is evidence sufficient to support a finding of reckless indifference to consumer safety."), *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (Florida law) ("[C]ompliance with [federal Motor Vehicle Safety Act Standards], which were far from comprehensive, [did not] preclude[ ] any finding of recklessness"); *Brown by Brown v. Stone Mfg. Co., Inc.*, 660 F. Supp. 454 (S.D. Miss. 1986) (Mississippi law) (compliance with federal flammability standards not conclusive on issue of whether fabric was unreasonably dangerous); *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 311 (Ga. Ct. App. 1994) (rejecting argument that compliance with FMVSS 301 "precludes an award of punitive damages where . . . there is other evidence showing culpable behavior").

The record reveals that Wyeth "was negligent in failing to conduct appropriate studies on breast cancer and that it concealed material facts about its products' safety." Pet. App. 34a, 38a Moreover, as studies established the dangers its hormone therapy drug created, "Wyeth sought to downplay the studies' results and divert attention from the information." *Id.* Wyeth financed and manipulated scientific studies and sponsored medical articles to downplay the risk of cancer while promoting unproven benefits. Pet. App. 30a Plainly, Wyeth's reckless indifference to consumer safety was well-established.

A defendant who pursues a course of ongoing, deliberate misconduct, as Wyeth did here, has more than "fair notice" of the possibility of a substantial punitive damage award. In view of this record, Wyeth's conduct was unquestionably reprehensible, supports the reduced award determined by the Nevada courts, and does not merit exercise of this Court's discretion to review the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS INC.,
PETITIONERS

v.

JERALDINE SCOFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR THE PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR THE PETITIONERS

As explained in the petition, this case presents two questions of exceptional importance to civil litigants. The first is whether, when a trial court finds that a verdict has been tainted by a jury's passion or prejudice, due process requires the court to grant a new trial instead of remittitur. The second is whether, and in what circumstances, a trial court violates due process when it awards a substantial amount in compensatory damages but nevertheless proceeds to award an even greater amount in punitive damages.

In their brief in opposition, respondents largely avoid confronting the significant divisions of authority in the lower courts on those questions. Instead, respondents devote much of their brief to a heavily slanted and entirely unsourced rendition of the facts. To the extent

respondents proceed to address the questions presented, they primarily contend that the first question is not properly before this Court and that the conflict of authority on the second question is fact-bound and therefore does not warrant the Court's review. Respondents are incorrect in each respect. In actuality, this case presents an especially suitable vehicle in which to provide much-needed guidance to the lower courts on both questions. The petition for certiorari should therefore be granted.

A. This Court Should Grant Review To Decide Whether The Only Appropriate Remedy For A Verdict Resulting From A Jury's Passion Or Prejudice Is A New Trial

1. With regard to the passion-or-prejudice question, respondents do not dispute that, since this Court's decision in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Moquin*, 283 U.S. 520 (1931), most federal courts of appeals and numerous state courts of last resort have held that the only appropriate remedy for a verdict resulting from a jury's passion or prejudice is a new trial—with only a few courts holding to the contrary. See Pet. 11-14. Respondents instead merely contend (Br. in Opp. 19-21) that no court has squarely held that such a rule is required *as a matter of due process*. That contention lacks merit.

To be sure, in *Moquin* itself, this Court did not expressly ground the rule it was adopting in due process—although, in proposing that rule, the petitioner in *Moquin* cited due process as its basis. See Pet. Br. at 12-13, *Moquin*, *supra* (No. 543). Contrary to respondents' contention (Br. in Opp. 19-21), however, lower courts have generally understood the rule of *Moquin* not to be confined to the context of the particular federal statute that supplied the cause of action, but rather to reflect a gen-

erally applicable constitutional principle.[1] For example, numerous state-court decisions have relied on *Moquin* in requiring a new trial—reliance that would make little sense unless the rule of *Moquin* were rooted in an incorporated principle of federal constitutional law. See, *e.g.*, *Hash* v. *Hogan*, 453 P.2d 468, 473 & n.15 (Alaska 1969); *Higgs* v. *District Court*, 713 P.2d 840, 861 (Colo. 1985); *Stokes* v. *Wabash R.R.*, 197 S.W.2d 304, 309 (Mo. 1946).[2]

But to the extent there is any lingering uncertainty about the basis for the *Moquin* rule, that uncertainty provides an additional reason for granting review here, not a reason for denying it. See PLAC Br. 6-7. As explained in the petition (at 14-15) and in PLAC's amicus brief (at 12-15), the better view is that due process is violated when a verdict is "the product of bias or passion," *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989), and that remittitur is an inadequate remedy for such a violation because of the risk that the jury's bias "may have infected the decision of the jury on liability, as well as damages," 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2865, at 165 (2d ed. 1995).

Respondents do not directly take issue with those propositions. Instead, they merely contend (Br. in Opp.

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[1] Members of this Court have also understood *Moquin* in that manner. See *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (plurality opinion) (citing *Moquin* for the "general rule" that "a verdict based on jury prejudice cannot be sustained").

[2] Respondents contend (Br. in Opp. 20) that, "[i]n some of the cited cases, state law simply required the application of such a rule." In the only case respondents cite for that proposition, however, the court relied entirely on *federal* cases, which in turn cited *Moquin*. See *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 504 U.S. 910 (1992).

23) that "[r]emittitur as a remedy for excessive damages dates back to the English common law." But contrary to respondents' suggestion (Br. in Opp. 25), applying the *Moquin* rule here would not require this Court to "supplant[]" remittitur in the circumstances in which it is traditionally used: *viz.*, where the damages awarded are merely excessive (and a court need only determine the amount the jury could validly have awarded based on the evidence). See Pet. 11; PLAC Br. 15-19. Indeed, respondents do not identify a single jurisdiction in which adoption of the *Moquin* rule has extinguished the practice of remittitur. The Nevada Supreme Court therefore erred when it held, despite its recognition that passion and prejudice had infected the verdict, that remittitur "spared" the verdict without the need for a new trial. See Pet. App. 43a.

2. In the alternative, respondents contend at length (Br. in Opp. 10-19, 21-23) that the passion-or-prejudice question is not properly before the Court in the first place. That contention is flawed.

a. Respondents first suggest (Br. in Opp. 10-13) that petitioners invited the trial court's error by requesting that the trial court grant remittitur. But as respondents concede (Br. in Opp. 13), petitioners sought remittitur only as an *alternative* to a new trial. As soon as it became clear that the jury's initial damages award contained a sizable punitive component, petitioners moved for a mistrial on the ground that the jury's premature, uninstructed determination of punishment had tainted its verdict. See Pet. Nev. S. Ct. App. 7889-7893. And after the jury was reinstructed and returned a substantially identical award, petitioners moved for a new trial on the ground that the misconduct culminating in the jury's award had "deprived [petitioners] of substantial rights, including [their] rights to due process * * *

under the * * * United States Constitution[]." *Id.* at 7116-7117. Petitioners sought remittitur only in the alternative; although petitioners phrased that request in terms of "passion and/or prejudice" (consistent with Nevada law), it is clear that petitioners were seeking remittitur in the traditional sense: *i.e.*, a determination that the damages award was excessive and "unsupported by the evidence." *Id.* at 7128-7129. That request for remittitur was therefore conceptually discrete from petitioners' contention that the correct remedy for the tainted verdict was a new trial. Because petitioners have consistently sought a new trial as the remedy for the tainted verdict, the invited-error doctrine is inapplicable here.

b. Respondents next contend (Br. in Opp. 13-19) that the passion-or-prejudice question was not pressed in, or passed upon by, the Nevada Supreme Court. That contention, too, is mistaken. Before that court, petitioners repeatedly contended that, in light of the trial court's finding that the jury's verdict had been infected by passion and prejudice, a new trial—and *only* a new trial—was the appropriate remedy as a matter of due process:

> As the trial court eventually acknowledged, the jury's "passion and prejudice" affected both the compensatory and punitive awards. But the court's solution—remittitur rather than a new trial—was patently inadequate to correct the legal and constitutional errors in the verdict[.]

Pet. Nev. S. Ct. Br. 2-3; see *id.* at 3 (contending that the failure to grant a new trial violated petitioners' "rights to due process and a fair trial"); *id.* at 25-26 (arguing that "this case involves violations of [petitioners'] basic rights to due process and a fair trial, a jury deliberately incited by [respondents'] counsel and acting with passion and prejudice, and a premature determination of [petition-

ers'] punishment, which the jury adhered to in its subsequent deliberations").[3] Indeed, in their own brief, respondents addressed, and attempted to rebut, that very argument. See, *e.g.*, Resp. Nev. S. Ct. Br. 17 (addressing petitioners' "claim of passion-induced verdict" under argument heading that petitioners "fail[ed] to establish that the trial court's remittitur [was] inappropriate"). Petitioners therefore did more than enough to satisfy the requirements for preservation of an error of federal law in a case arising from state court. See 28 U.S.C. 1257(a).

Because petitioners clearly pressed the argument before the Nevada Supreme Court that the only appropriate remedy for a verdict resulting from passion or prejudice is a new trial, it is not necessary that the court have actually passed upon that argument. See, *e.g.*, *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). But the Nevada Supreme Court in any event did so when it held that remittitur of the damages award was an appropriate remedy that "spared" the jury's verdict, notwithstanding its determination that the verdict had resulted from passion and prejudice. See Pet. App. 43a. To the extent that the court's treatment was cursory, petitioners can hardly be faulted for the court's failure to address the argument in greater detail. Because the passion-or-prejudice question was pressed in, and passed upon by, the Nevada Supreme Court, there is no obstacle to this Court's granting review on the question here.

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[3] To the extent petitioners again sought remittitur as an alternative to a new trial, they did so only much later in their brief—and after reiterating that the "only appropriate action under the circumstances" was to order a new trial. Br. in Opp. App. 4a (quoting Pet. Nev. S. Ct. Br. 41).

c. Finally as to the passion-or-prejudice question, respondents contend (Br. in Opp. 21-23) that this case presents a poor vehicle for consideration of the question because the lower courts did not specifically find that passion or prejudice had infected the jury's decision on liability. It is clear, however, that the lower courts did find that passion and prejudice had infected the jury's verdict more generally—and that is all that is required to trigger the *Moquin* rule.[4] The trial court not only found that the "totality of the circumstances indicate that the amounts of the verdicts suggest they were the result of passion and prejudice," Pet. App. 51a (internal quotation marks and citation omitted); it also specifically found that "[i]t appears that the jury's feelings regarding punitive damages impacted its award of compensatory damages," which would be "flagrantly improper." *Id.* at 46a-47a (citation omitted). Based on those findings, the Nevada Supreme Court stated without qualification that "the premature jury deliberations on punitive damages had significantly tainted the jury's verdicts as being the result of passion and prejudice." *Id.* at 43a.

Notably, respondents do not, because they cannot, dispute the proposition that passion and prejudice did in fact infect the jury's verdict. There can be no serious doubt that, in disregard of the trial court's instructions, the jury improperly considered punitive damages at the same time it was considering liability—thereby creating

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[4] To trigger the *Moquin* rule, it is not necessary that a court specifically find that passion or prejudice actually infected the jury's decision on liability—a finding that would be "virtually impossible" to make. *Higgs*, 713 P.2d at 861; see *Moquin*, 283 U.S. at 521 (holding that "no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice") (emphasis added).

a substantial risk that the jury's liability determination was itself compromised. See Pet. 6-7. And there can be no serious doubt that the jury improperly considered punitive damages not by "mistake[]," Br. in Opp. 7, but because it had been goaded to do so through a series of inflammatory statements made by respondents' counsel, see Pet. 5-6—statements that respondents do not even attempt to defend. Because the lower courts expressly found that passion and prejudice had infected the jury's verdict in this case, and because those findings were plainly correct, this case is an ideal vehicle for the Court to resolve the conflict among the lower courts and hold that, in the event of passion or prejudice, due process compels a new trial.

B. This Court Should Grant Review To Decide Whether The Remitted Punitive Damages Are Constitutionally Excessive

1. With regard to the punitive-damages question, respondents do not dispute that lower courts have taken divergent approaches as to what constitutes a permissible damages ratio in cases involving substantial compensatory awards. As respondents note (Br. in Opp. 26), this Court has generally stated that it is "reluctant to identify concrete constitutional limits on the ratio" of punitive to compensatory damages. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003). At the same time, however, the Court has specifically stated that, "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Ibid.* Only three years ago, the Court reiterated the latter principle as a "constitutional upper limit" and a "due process standard[] that every award must pass." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 501, 514 (2008). Although respondents correctly observe (Br.

in Opp. 27) that *Exxon Shipping* arose in the context of federal maritime law, it is beyond dispute that, in discussing *State Farm* in *Exxon Shipping* (and in *State Farm* itself), the Court was addressing the *constitutional* limits on punitive awards.

To be sure, there is some tension between the Court's general reluctance to adopt hard-and-fast limits on the ratio and its suggestion that there may be "constitutional upper limit[s]" in cases involving "substantial" compensatory awards. But that is precisely the tension with which lower courts have struggled in the eight years since the Court's decision in *State Farm*. Respondents attempt to brush aside the disarray in the lower courts by contending that courts applying a 1:1 ratio in cases involving "substantial" compensatory awards have done so only after "examin[ing] the specific facts and circumstances." Br. in Opp. 31. But respondents overlook that those courts have concluded that the 1:1 ratio operated *as a matter of law* to limit punitive awards, whereas other courts have held that a 1:1 ratio is not legally required even where the award of compensatory damages was concededly "substantial." See Pet. 19-21. The Court's review is desperately needed to clarify the correct approach in these cases, so that the mere happenstance of where suit is brought does not dictate the permissible size of the punitive award.

2. Respondents' other reasons for denying review on the punitive-damages question are insubstantial.

As a preliminary matter, respondents suggest (Br. in Opp. 28-29) that, because the ratio of punitive to compensatory damages in this case is 1.56:1, there is "hardly a difference sufficient to warrant this Court's consideration." But respondents do not dispute that the compensatory damages in this case were substantial (and indeed, far higher than in any other case in which the

Court has had the opportunity to consider the question, see Pet. 30-31). And where the compensatory damages are already so large in absolute terms, even small differences in the ratio make a big difference: here, more than $12 million if a 1:1 ratio were applied instead.

Respondents contend (Br. in Opp. 29) that reviewing this case "would encourage every defendant" subjected to punitive damages to seek certiorari "whenever punitive damages do not strictly conform to their preferred ratio limit." If anything, it is the disarray in the lower courts that is already generating a steady stream of petitions for certiorari. See Pet. 30-31. The Court's review in this case would provide much-needed clarity on the circumstances under which punitive damages are excessive—and thereby reduce, not increase, the number of requests for further review.

Finally, respondents assert (Br. in Opp. 29) that petitioners are seeking "an absolute dollar threshold that would trigger the imposition of a strict 1:1 ratio." As explained at length in the petition (at 24-29), however, the Court need not adopt a categorical bright-line rule in order to reverse the punitive award in this case. Respondents do not dispute that, because (as the trial court noted) the "great bulk" of the compensatory damages in this case "were for pain, suffering and emotional distress," Pet. App. 46a, the punitive award in this case "likely * * * duplicated" substantial aspects of the compensatory award. Pet. 24-25 (quoting *State Farm*, 538 U.S. at 426). Nor do respondents dispute that the other guideposts established by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), confirm that the punitive award in this case was grossly excessive and arbitrary. With regard to reprehensibility, respondents make no effort to defend their reliance below on alleged conduct by petitioners that was uncon-

nected either to the individual plaintiffs or to the State of Nevada. See Pet. 27-28. And with regard to comparable penalties, respondents make no effort to defend the trial court's exclusive reliance on a recent federal penalty against another company for unspecified conduct. See Pet. 28-29.[5]

In sum, this is the paradigmatic case in which a punitive award that is significantly larger than an already substantial compensatory award is inappropriate. The Court should grant review on both questions presented and reverse the manifestly unfair outcome in this case.

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[5] Respondents contend at length (Br. in Opp. 31-34) that compliance with relevant FDA requirements does not categorically bar the availability of punitive damages. But petitioners have argued only that compliance with FDA requirements constitutes compelling evidence weighing against a determination of reprehensibility—and respondents fail to address any of the cases cited in the petition for that proposition. See Pet. 26-27.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS INC.,
Petitioners,

v.

JERALDINE SCOFIELD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Petitioner has presented two questions in its petition, each of which independently warrants this Court's review. This *amicus* brief will be limited, however, to the first question presented in the petition—namely, whether due process requires a new trial (as opposed to a remittitur) when, as here, a verdict is the product of a party's appeals to the jury's passion and prejudice.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 925 briefs as amicus curiae in both state and federal courts, including more than 75 in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.[1]

Because PLAC's members frequently are subjected to inappropriate efforts by opposing counsel to

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. Both parties consented to the filing of this brief.

inflame the passions and prejudice of the jury, PLAC has a powerful interest in this Court's resolution of the remedial issue presented by petitioner. PLAC submits that this Court's review is needed to clarify that remittitur is not a constitutionally adequate remedy when, as here, a jury's verdict is the result of appeals to passion and prejudice.

SUMMARY OF ARGUMENT

In a series of cases, this Court has explained that, when a jury's verdict in a civil case is the result of passion and prejudice, a new trial is necessary. Because a finding of passion and prejudice necessarily means that the jury has abandoned its function as a neutral factfinder, remittitur of the damages does not remedy the problem. Although this principle would seem to be straightforward, the lower courts have evinced substantial confusion over its proper application.

To begin with, the lower courts have disagreed as to whether the principle is grounded in the Due Process Clause—and thus applies with full force in state-court cases involving state-law causes of action—or whether it is merely a rule of federal common law that may be persuasive, but is not controlling, in state-law cases.

In addition, confusion has arisen because "passion and prejudice" has taken on multiple meanings, which often are conflated by the lower courts. In some circumstances (like here), the term is used to describe a jury that has been biased by identifiable, extrinsic events that occurred during the trial—such as inflammatory evidence or inappropriate comments by counsel. In other cases, courts may use the term when a verdict is so patently unreasonable as to

compel an inference that the jury had departed from is role as an impartial arbiter. Finally, some courts have invoked the term "passion and prejudice" as a rationale for reducing a verdict that is excessive, albeit not monstrously so.

The decision below is emblematic of the confusion in the lower courts. Although it recognized that the jury may have been infected by actual passion and prejudice, stemming from identifiable misconduct at trial and evidenced by a massively excessive verdict, the Nevada Supreme Court nonetheless concluded that remittitur was a sufficient remedy. That conclusion flies in the face of the Due Process Clause's guarantee of a neutral factfinder.

This case, accordingly, is an ideal vehicle for putting an end to the lower courts' conceptual confusion. The Court should grant certiorari and make clear once and for all that a remittitur is not a constitutionally sufficient remedy for a verdict that is the result of discernible passion and prejudice.

ARGUMENT

THE QUESTION WHETHER DUE PROCESS REQUIRES A NEW TRIAL WHEN A VERDICT IS THE PRODUCT OF DISCERNIBLE PASSION AND PREJUDICE IS AN IMPORTANT ONE THAT WARRANTS REVIEW.

A. Although This Court Has Held That A New Trial Is The Proper Remedy For Passion And Prejudice, Its Failure To Identify The Source Of This Rule Has Caused A Divide In The Lower Courts.

On several occasions, this Court has identified the fundamental principle that, when a verdict is the

result of passion and prejudice, the appropriate remedy is a new trial before a new jury. But because the Court has not identified the source of this rule—*i.e.*, whether it derives from the Due Process Clause or federal common law—the lower courts have evidenced enormous confusion over its applicability in cases arising under state law.

1. In early cases, this Court explained that a verdict rendered by a jury inflamed by passion and prejudice must be set aside in its entirety, and that remittitur is an inadequate remedy.

The Court's first articulation of the principle was in *Arkansas Valley Land & Cattle Co.* v. *Mann*, 130 U.S. 69 (1889), a case involving a claim for conversion of cattle. The defendant in *Mann* contended that the remittitur ordered by the trial court was so substantial (more than half the verdict) as to require the conclusion that the jury was "either governed by passion, or had deliberately disregarded the facts" and that, as a consequence, the entire verdict should have been set aside. *Id.* at 74-75. This Court agreed that, had the trial court been of the view that the verdict was the product of passion, "it would have been in accordance with safe practice to set aside the verdict and submit the case to another jury." *Id.* at 75. Quoting with approval Justice Clifford's opinion in *Stafford* v. *Pawtucket Haircloth Co.*, 22 F. Cas. 1030, 1030-1031 (C.C. R.I. 1862), the Court explained that "'where the circumstances clearly indicate that the jury were influenced by prejudice, or by a reckless disregard of the instructions of the court,'" remittitur "'cannot be allowed'"; instead, "'[w]here such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their

entire finding.'" *Mann*, 130 U.S. at 75. The Court concluded, however, that it could not assume merely from the amount of the remittitur "that the court below believed that the jury were governed by prejudice, or willfully disregarded the evidence." *Ibid.* It accordingly held that it lacked the authority to interfere with the remedy selected by the trial court. *Id.* at 75-76.

The Court next confronted the "passion and prejudice" issue in *New York Central Railroad* v. *Johnson*, 279 U.S. 310 (1929). In *Johnson*, the Court found that trial counsel had engaged in conduct designed to improperly "appeal to passion and prejudice." *Id.* at 317. Notwithstanding the absence of a contemporaneous objection, the Court ordered a new trial, explaining that "[t]he public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice." *Id.* at 318.

Two years later, in *Minneapolis, St. Paul & Sault Ste. Marie Railway* v. *Moquin*, 283 U.S. 520 (1931), the Court was presented with the precise situation it had described in *Mann*. In *Moquin*, the petitioner sought to set aside a verdict under the Federal Employers' Liability Act "on the ground that misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial." *Id.* at 520. After finding that trial counsel had indeed engaged in misconduct, the Minnesota Supreme Court ordered a remittitur. This Court reversed, explaining: "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Id.* at 521. That is

because efforts to inflame passion or prejudice in a jury "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." *Ibid.* Accordingly, the Court held, "[a] litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Id.* at 521-522.

Finally, in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (plurality op.), the Court cited *Moquin* for the "general rule that a verdict based on jury prejudice cannot be sustained."

2. Although the Court has been consistent in its articulation of the principle that remittitur is not an adequate remedy for passion and prejudice, it has never identified the source of that rule—*i.e.*, whether it is a requirement of due process or instead is an aspect of federal common law.[2] Consequently, the lower courts have divided on the issue.

Several state courts have treated *Moquin* as controlling in cases involving state causes of action, implying that the rule is one of constitutional dimension. See, *e.g.*, *Higgs* v. *Dist. Ct. in and for Douglas County*, 713 P.2d 840, 861 (Colo. 1985); *Hash* v. *Ho-*

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[2] The petitioner in *Moquin* asserted that the principle is one of due process. Under the heading "Constitutional Requirements That This Principle Be Recognized," it argued that "[d]ue process implies a tribunal * * * [that is] impartial" and further that "there was no impartial trial in the present case" because "the jury acted under the influence of passion and prejudice." Br. for Pet. at 12-13, *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Moquin*, 283 U.S. 520 (1931) (No. 543), 1931 WL 32912 (internal quotation marks omitted). But the opinion does not indicate whether the Court agreed with that reasoning.

gan, 453 P.2d 468, 473 & n.15 (Alaska 1969); *Stokes* v. *Wabash R.R.*, 197 S.W.2d 304, 309 (Mo. 1946).

Other courts, however, have viewed *Moquin* as a rule of federal common law and thus treat it as merely persuasive authority in cases arising under state law. See, *e.g.*, *Quick* v. *Crane*, 727 P.2d 1187, 1198 (Idaho 1986); *Kugling* v. *Williamson*, 42 N.W.2d 534, 539 & n.6 (Minn. 1950); *Vandaveer* v. *Norfolk & W. Ry.*, 222 N.E.2d 897, 908 (Ill. App. Ct. 1966). Indeed, the California Court of Appeal has expressly *rejected* the view that *Moquin* is a due process case, stating that, because *Moquin* "was not announcing a rule of federal due process to guide litigation in state courts," it "is in no sense binding on this or any other California court." *Wollersheim* v. *Church of Scientology*, 6 Cal. Rptr. 2d 532, 546 (Ct. App. 1992).

As a result of this confusion over whether the *Mann/Moquin* rule is grounded in the Due Process Clause, the lower courts have divided on the question whether remittitur may be employed as a remedy for verdicts found to be the result of passion or prejudice. As petitioners detail, the vast majority of courts have followed *Moquin* and held that only a new trial may rectify a verdict that results from passion and prejudice. See Pet. 12-13. A minority of courts, however, have held that remittitur is a sufficient remedy. See Pet. 13-14; *Bonn* v. *Pepin*, 11 A.3d 76, 78 (R.I. 2011).

Review is needed to resolve the confusion over whether the *Mann/Moquin* rule is required by due process and hence whether that rule controls in cases arising under state law.

B. Additional Confusion Has Resulted Because Some Courts Conflate Passion And Prejudice With Excessiveness Of The Verdict.

The confusion in the lower courts about this issue has been exacerbated because the term "passion and prejudice" has taken on multiple meanings over the years. Courts frequently have conflated those distinct meanings, often selecting a constitutionally inadequate remedy as a result.

First, the term "passion and prejudice" can refer to situations in which events at trial—including the introduction of admissible, yet emotion-evoking, evidence; the regular attendance at trial of a badly injured and hence highly sympathetic plaintiff; or the inflammatory rhetoric of counsel—cause the jury to abandon its neutrality. See, *e.g.*, *Thamann* v. *Bartish*, 856 N.E.2d 301, 304, 308 (Ohio Ct. App. 2006) (holding that "defense counsel consciously engaged throughout the trial in a pattern of misconduct that was designed to inflame the jury's passion and prejudice," conduct that included "repeatedly making improper remarks about the plaintiff, his counsel, and their expert witnesses"). This category can be denominated *extrinsic* passion and prejudice because the passion and prejudice is the result of identifiable, external influences on the jury's deliberative process.

Second, many courts have reasoned that, when a verdict is massively in excess of any amount supportable by the evidence, the jury must have been animated by passion and prejudice—even in the absence of any discernible extrinsic source. See, *e.g.*, *Ramirez* v. *New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) ("It is true that the size of a jury's verdict may be so excessive as to be

inherently indicative of passion or prejudice and to require a new trial.") (internal quotation marks omitted); *Wells* v. *Dallas Indep. Sch. Dist.*, 793 F.2d 679, 684 (5th Cir. 1986) ("[A]t some point on the scale an excessive award becomes so large that it can no longer be considered merely excessive. At that point, when an award is so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive, remittitur is inadequate and the only proper remedy is a new trial.") (internal quotation marks and citation omitted); *Coffin* v. *Coffin*, 4 Mass. 1, 41 (1808) (from the "exorbitancy" of damages, a court may "conclude that the jury acted from passion, partiality, or corruption"); *Branham* v. *Ford Motor Co.*, 701 S.E.2d 5, 23 (S.C. 2010) ("When a verdict is grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.") (internal quotation marks omitted); *Branch* v. *Bass*, 37 Tenn. (5 Sneed) 366 (1858) (a "grossly exorbitant" verdict may "furnish intrinsic evidence that the verdict was probably the result of partiality, passion, corruption, or some improper motive or influence").

Both of these two categories entail a judicial conclusion that a jury has become biased by passion and prejudice and thereby abdicated its role of neutral arbiter. Accordingly, only a new trial can adequately remedy the problem.

Confusion has arisen, however, as a result of a third way in which courts have used the term "passion and prejudice." Some courts, laboring under the view that they may intervene to correct an excessive

verdict *only* upon finding passion or prejudice, have created a legal fiction whereby any excessive verdict is deemed, at least in a formalistic sense, the product of passion or prejudice. The Supreme Court of Wisconsin, for example, long ago explained:

> The fact that larger damages are awarded than the court would give, were it to assess them, is not of itself sufficient to justify a reversal of the judgment. Before the court can interfere it must find in the verdict evidence of partiality, passion or improper bias or prejudice on the part of the jury.

Schultz v. *Chicago, M. & St. P.R. Co.*, 4 N.W. 399, 405 (Wis. 1880). Courts following this view of their limited authority accordingly must label any award they deem to warrant reduction as being the product of passion and prejudice—without regard to whether they have concluded that the jury actually departed from its required neutrality. See Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 508 n.597 (2004) ("[T]he passion or prejudice inquiry was usually just a legal fiction to challenge awards suspect in size alone."). See, *e.g.*, *Farber* v. *Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990); *Matlock* v. *Greyhound Lines, Inc.*, 2010 WL 3171262, at *1-2 (D. Nev. 2010); *United States* ex rel. *Maxwell* v. *Kerr-McGee Oil & Gas Corp.*, 2009 WL 3161828, at *10 (D. Colo. 2009); *Carr* v. *Nance*, 2010 WL 5144789 (Ark. 2010); *Montesinos* v. *Zapata*, 43 So. 3d 97, 98-99 (Fla. Dist. Ct. App. 2010); *City of Hollywood* v. *Hogan*, 986 So. 2d 634, 647 (Fla. Dist. Ct. App. 2008); *Davis* v. *Walters*, 54 So. 3d 272, 276 (Miss. Ct. App. 2010);

Smith v. *Fairfax Realty, Inc.*, 82 P.3d 1064, 1070 (Utah 2003).

Unlike the first two senses in which the term "passion and prejudice" is used, this third sense does not entail a determination that the jury has abandoned its neutrality; it is merely a finding of excessiveness. Accordingly, remittitur is a perfectly sufficient remedy for this species of "passion and prejudice." But courts sometimes have conflated this third sense with the other two, with the result being that they have employed remittitur—and denied an unconditional new trial—despite concluding either from the existence of extrinsic sources or from the gross excessiveness of the awards that the jury was animated by passion and prejudice. See, *e.g.*, *McCabe* v. *Mais*, 580 F. Supp. 2d 815, 831 (N.D. Iowa 2008) (employing remittitur despite being "convinced that the jury impermissibly acted out of passion and a desire to punish")[3]; *Xay Fong* v. *All Lots, L.L.C.*, 771 N.W.2d 653 (table), 2009 WL 1492561, at *4 (Iowa Ct. App. 2009) (approving use of remittitur as a cure for counsel's prejudicial misconduct at trial); *Reiss* v. *Davis*, 2008 WL 5058013, at *4 (Minn. Ct. App. 2008) (affirming trial court's use of remittitur notwithstanding the trial court's finding "that the jury acted with passion or prejudice in awarding punitive damages"). Because, as we next explain, remittitur is a constitutionally inadequate remedy for such passion and prejudice, review is warranted to resolve the

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[3] The Eighth Circuit had no problem with the district court's decision to employ remittitur, but reversed for redetermination of the amount. *McCabe* v. *Parker*, 608 F.3d 1068, 1081-1082 (8th Cir. 2010).

confusion over the different meanings of "passion and prejudice."

C. Due Process Requires A New Trial When A Verdict Is The Result Of Passion And Prejudice.

The Court may straightforwardly resolve the lower courts' confusion by holding that due process requires a new trial whenever a court concludes, either because of the existence of extrinsic sources or from the gross excessiveness of a verdict, that the jury was animated by passion and prejudice. Basic principles of due process, as well as longstanding historical practice, require that holding.

1. "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981). See also *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 9-10 (1991); *In re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring). Courts "must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter*, 452 U.S. at 24-25.

The interests at stake here are of obvious importance. Indeed, "[i]t is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (alteration omitted). "Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. at 136. In fact, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endea-

vored to prevent even the *probability* of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (emphasis added) (quoting *In re Murchison*, 349 U.S. at 136). Thus the mere "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Ibid.*

When a jury has been infected by passion and prejudice, that necessarily means that it no longer is able to serve as an impartial factfinder and, as a result, that every aspect of its deliberations is tainted. As the Court has explained, "[t]here can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to [poison] the judgment and prevent the freedom of fair action." *Groppi* v. *Wisconsin*, 400 U.S. 505, 511 n.12 (1971) (internal quotation marks omitted). Simply put, "a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989).

Yet remittitur is the functional equivalent of upholding a verdict: it is the denial of a new trial conditioned on the plaintiff's acceptance of a reduced amount of damages. It in no way rectifies the deprivation of an impartial factfinder with respect to underlying liability determinations, affirmative defenses, comparative fault, and other issues. Because a jury's departure from impartiality affects "all the questions in the case" (*Atchison, Topeka & Santa Fe R.R.* v. *Dwelle*, 24 P. 500, 506 (Kan. 1890)), only an unconditional new trial can remedy that problem.

See, *e.g.*, *Dossett* v. *First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005) ("[I]f passion or prejudice influenced the jury's damages decision, then that same passion or prejudice may well have affected its decision on the issue of liability as well."); *Atchison, Topeka & Santa Fe R.R.* v. *Cone*, 15 P. 499, 505 (Kan. 1887) (ordering a new trial and explaining that "if one-half of the verdict was rendered under the influence of passion or prejudice, the other half must also have been rendered under the influence of passion or prejudice"); 11 Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 2815, at 165 (2d ed. 2010) ("[Remittitur] is not proper if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability, as well as on damages. In those instances a complete new trial is required.").

Few principles of American law are more deeply entrenched than that there must be an adequate remedy "for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Here, the "vested legal right" is the right to an impartial factfinder, and a determination that the verdict is the result of passion and prejudice is a finding of the violation of such a right. The Due Process Clause demands that the remedy be tailored to the violation. See *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (if a state collects a tax that discriminates against interstate commerce, the Due Process Clause mandates that the state provide backward-looking relief that fully removes the discriminatory effects of the unconstitutional tax). Because only a new trial before an impartial jury, and not a remittitur of the verdict, can eradicate the harm caused by a jury that has been ani-

mated by passion and prejudice, the Due Process Clause requires that remedy.

2. That conclusion is bolstered by historical practice. From its inception, remittitur was viewed as a cure for excessive verdicts alone; courts were nearly uniform in holding that remittitur was an insufficient remedy for verdicts that were the product of actual passion and prejudice.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). See also *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991) ("[H]istory and widely shared practice [are] concrete indicators of what fundamental fairness and rationality require."). Although history alone may not be sufficient to enshrine long-standing practice as a constitutional requirement, "such [historical] adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" *In re Winship*, 397 U.S. at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968)).

The genesis of remittitur is typically traced to Justice Story's decision in *Blunt* v. *Little*, 3 F. Cas. 760 (C.C. Mass. 1822). See 11 FEDERAL PRACTICE & PROCEDURE § 2815, at 160. In *Blunt*, there was no finding that the verdict was the result of passion and prejudice; rather, Justice Story concluded that the award entered by the jury was simply excessive. 3 F. Cas. at 761-762. As a remedy, the case was remanded for a new trial, "unless the plaintiff [was] willing to remit $500 of his damages." *Id.* at 762. From that point forward, remittitur has been deemed a proper remedy for excessive verdicts. See, *e.g.*, *N. Pac. R.R.* v. *Herbert*, 116 U.S. 642, 646 (1886); *Hall*

v. *Nw. R.R.*, 62 S.E. 848, 853 (S.C. 1908); *Noxon* v. *Remington*, 61 A. 963, 964 (Conn. 1905); *Tarbell* v. *Tarbell*, 15 A. 104, 107-108 (Vt. 1888).

At the same time, courts were nearly uniform in holding that remittitur is an insufficient cure for a jury inflamed by passion and prejudice. Regardless of whether the passion and prejudice was evidenced by a grossly excessive verdict alone or instead stemmed from identifiable events during trial, courts regularly explained that verdicts returned by an impassioned and prejudiced jury could not be cured by remittitur. At the time the Supreme Court decided *Moquin*, courts in at least 26 states had explicitly adopted this rule.[4]

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[4] **Arizona:** *United Verde Copper Co.* v. *Wiley*, 183 P. 737, 738-739 (Ariz. 1919); **Colorado:** *F.M. Davis Iron Works Co.* v. *White*, 71 P. 384, 386 (Colo. 1903) ("[W]here the fault found with the verdict is not that it is merely excessive, but the largeness of the amount is due to improper motives on the part of the jury, a remittitur does not cure the defect, but the verdict should be set aside in its entirety."); *Tunnel Mining & Leasing Co.* v. *Cooper*, 115 P. 901, 902 (Colo. 1911); **Idaho:** *Geist* v. *Moore*, 70 P.2d 403, 407-408 (Idaho 1937); **Illinois:** *Loewenthal* v. *Streng*, 90 Ill. 74 (1878) (When a verdict "is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the *remittitur* does not remove the prejudice, passion or misconception."); **Indiana:** *Elliott* v. *Kraus*, 172 N.E. 783, 785 (Ind. Ct. App. 1930) (en banc); **Iowa:** *Ahrens* v. *Fenton*, 115 N.W. 233, 235 (Iowa 1908) ("If the verdict is vitiated by improper conduct of the jury, it is vitiated as a whole, and not simply to the extent that the trial court may think it in excess of what should reasonably be allowed."); **Kansas:** *City of Argentine* v. *Bender*, 80 P. 935, 935-936 (Kan. 1905); *Steinbuchel* v. *Wright*, 23 P. 560 (Kan. 1890); *Bell* v. *Morse*, 29 P. 1086, 1086 (Kan. 1892); **Kentucky:** *Taylor* v. *Giger*, 3 Ky. (Hard.) 586 (Ct. App. 1808); *Vanzant* v. *Jones*, 33 Ky. (3 Dana) 464 (1835); **Maine:** *Chaisson* v. *Williams*, 156 A. 154, 159 (Me.

1931); **Minnesota:** *Larson* v. *Wisconsin Ry., Light & Power Co.*, 164 N.W. 666, 668 (Minn. 1917); **Missouri**: *Chitty* v. *St. Louis, Iron Mountain, & S. Ry.*, 49 S.W. 868, 872 (Mo. 1899) ("[W]henever the damages are so excessive as to strike the judicial mind as being the result of passion, prejudice, or misconduct of the jury, it is [the court's] duty to reverse the judgment."); *Burdict* v. *Mo. Pac. Ry. Co.*, 27 S.W. 453, 458 (Mo. 1894); **Montana:** *Blessing* v. *Angell*, 214 P. 71, 73 (Mont. 1923) ("It is the well-settled rule that a remittitur will not cure a verdict tainted by passion and prejudice."); **Nebraska:** *Wainwright* v. *Satterfield*, 72 N.W. 359, 359 (Neb. 1897); **New Jersey:** *Tischler* v. *W. Jersey & Seashore R.R.*, 155 A. 139, 139 (N.J. 1931); **New Mexico:** *Henderson* v. *Dreyfus*, 191 P. 442, 446 (N.M. 1919) ("[W]here the amount of the verdict is the result of passion and prejudice, such passion and prejudice may and probably did influence the jury in the determination of the other issues in the case upon the decision of which the verdict was founded."); **North Carolina:** *Harvey* v. *Atlantic Coast Line R.R.*, 69 S.E. 627, 630 (N.C. 1910) ("[W]hen it is clear that a jury, in disregard of the testimony, has rendered a verdict under the influence of passion or prejudice, a presiding judge should be prompt to set the same aside."); **North Dakota:** *Larson* v. *Russell*, 176 N.W. 998, 1008 (N.D. 1919) ("In this state it is true that this court has held that a new trial must be granted absolutely, and there is no power to authorize a remittitur of a portion of the damages awarded, where the same are excessive through the influence of bias or prejudice upon the jury."); **Ohio**: *Schendel* v. *Bradford*, 140 N.E. 155, 157 (Ohio 1922) ("If the verdict was given under the influence of passion or prejudice, neither the trial court nor a reviewing court could require a remittitur. In that event no power exists in either but to reverse unconditionally."); *Toledo Rys. & Light Co.* v. *Paulin*, 113 N.E. 269, 270 (Ohio 1916); **Oklahoma**: *Rhyne* v. *Turley*, 131 P. 695, 696 (Okla. 1913) ("[T]he prejudice and passion which the record to our minds so clearly shows must have permeated the whole case, rendering it impossible to give to the evidence that fair and impartial consideration contemplated in a jury trial. Under such a situation, the court should have set this verdict aside and granted a new trial."); *Choctaw, Okla & Gulf R.R.* v. *Burgess*, 97 P. 271, 281 (Okla. 1908); **Oregon:** *Adcock* v. *Oregon R.R. & Navigation Co.*, 77 P. 78, 80 (Or. 1904) ("[W]here it

In *Atchison, Topeka & Santa Fe Railroad* v. *Dwelle*, 24 P. 500 (Kan. 1890), for example, the trial court found trial misconduct designed to inflame the jury's passion and prejudices, and thus ordered a remittitur. *Id.* at 506. The Kansas Supreme Court concurred that misconduct occurred at trial, but it rejected the trial court's attempt to remedy the problem by a remittitur, explaining: "If the jury were influenced by passion and prejudice in rendering the verdict which the court found to be excessive to so great an extent, there were sufficient grounds for holding that the entire verdict, and all the questions in the case, were likewise influenced." *Ibid.*

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clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected, since the effect is to cast suspicion on the conduct of the jury and their entire finding."); **Rhode Island:** *Stafford*, 22 F. Cas. at 1030-1031; **Texas:** *Gen. Accident Fire & Life Ins. Corp.* v. *Bundren*, 283 S.W. 491, 494 (Tex. 1926) ("The authorities are almost uniform that even a trial judge in any case is not authorized to substitute his own judgment and remit a part of the verdict of the jury where such verdict evidences the existence of passion or prejudice"); **Utah:** *Stephens Ranch & Live Stock Co.* v. *Union Pac. R.R.*, 161 P. 459, 462 (Utah 1916) ("It is quite true that, where it is made to appear that the verdict is excessive, and that such excess is the result of passion and prejudice, or either, the error cannot be cured by remitting the excess from the verdict."); **Vermont:** *Smith* v. *Martin*, 106 A. 666, 673 (Vt. 1919) ("The general rule is that, where an excessive verdict has been rendered through bias, passion, or prejudice, the error taints the whole verdict, and cannot be cured by remittitur, but the defendant is entitled to a new trial as matter of right."); **Washington:** *Olson* v. *N. Pac. Ry.*, 96 P. 150, 152 (Wash. 1908) (Where "the verdict discloses such passion and prejudice on the part of the jury," remittitur is inappropriate because "it would be unjust to hold a litigant foreclosed by any of the findings."); **West Virginia:** *Unfried* v. *Baltimore & Ohio R.R.*, 12 S.E. 512, 518-519 (W. Va. 1890).

Similarly, in *Chicago & Erie Railroad* v. *Binkopski*, 72 Ill. App. 22 (1897), "passion and prejudice was induced by improper remarks and conduct of counsel for appellee during the progress of the trial." Under these circumstances, the appellate court held, "remittitur does not render the judgment a wholesome one." *Ibid.* "If the minds of the jurors were prejudiced against the defense by the language and repeated insinuations of appellee's counsel," the court explained, "then there was not that cool and deliberate consideration of the evidence as to the vital issue in the case, to wit, appellant's liability on account of negligence, that should be had in every case." *Ibid.*

Only a scattered handful of courts appear to have deviated from this view. See, *e.g.*, *Ross* v. *Clark*, 274 P. 639, 641-642 (Ariz. 1929); *Grant* v. *Louisville & N. R.R.*, 165 S.W. 963, 965-966 (Tenn. 1914).

The historical practice thus confirms that there is a deeply rooted tradition (grounded in both logic and principles of fundamental fairness) of ordering a new trial upon finding that a verdict is the product of passion and prejudice. That tradition reinforces the conclusion that this remedy is required by the Due Process Clause.

D. This Case Is An Ideal Vehicle For Resolving The Conceptual Confusion In The Lower Courts.

This case demonstrates precisely why passion and prejudice resulting from inflammatory rhetoric or similar extrinsic sources may be corrected only by a new trial. Here, there can be no doubt that plaintiffs' trial counsel made a concerted effort to rouse passions and prejudices in the jury. Counsel made

unsupported assertions that petitioners gave enough women cancer to fill two local college football stadiums (and then showed the jury pictures of the stadiums). She recited an irrelevant and highly inflammatory "monologue" about the Race for the Cure that described women whose breasts were "cut off and thrown in the trash," whose skin "blistered hot from the radiation" used in their cancer treatments, and who had gone bald and lost their eyebrows and eyelashes from such treatments. She also injected into the trial the salaries of petitioner's executives purportedly for the jury's use in setting plaintiffs' compensatory damages. Pet. 5-6. These statements were monumentally prejudicial; they resulted not just in grossly excessive awards of compensatory and punitive damages, but also in the kind of extrinsic passion and prejudice that infects the entirety of the deliberative process—a departure from impartiality that was borne out by the jury's undeniably impermissible effort to incorporate prematurely $100 million of punitive damages into the compensatory awards and its restoration of that amount at the close of proceedings. Pet. 6-7.

The Supreme Court of Nevada, however, found that "[t]o the extent that the complained-of closing arguments inflamed the jury's passion and prejudice against [petitioner], we conclude that the district court properly reduced the * * * compensatory damages award in light of the conflicting evidence presented." Pet. App. 36a n.11. And it held that the improper verdicts "were spared" when the court reduced the awards. *Id.* at 43a. The case thus could not more squarely present the question whether remittitur is a constitutionally adequate remedy for a verdict that is the product of passion and prejudice. The

Court should grant the petition to resolve that important, recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.[1]

3M

Altec Industries

Altria Client Services Inc.

Arai Helmet, Ltd.

Astec Industries

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Brown-Forman Corporation

Caterpillar Inc.

Chrysler Group LLC

Continental Tire the Americas LLC

Cooper Tire and Rubber Company

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[1] As of April 4, 2011.

Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc., Joy Mining Machinery

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Leviton Manufacturing Co., Inc.

Lincoln Electric Company

Magna International Inc.

Marucci Sports, L.L.C.

Mazak Corporation

Mazda (North America), Inc.

Medtronic, Inc.

Merck & Co., Inc.

Michelin North America, Inc.

Microsoft Corporation

Mitsubishi Motors North America, Inc.

Mueller Water Products

Mutual Pharmaceutical Company, Inc.

Navistar, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Segway Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Techtronic Industries North America, Inc.

Terex Corporation

TK Holdings Inc.

The Toro Company

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.